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ORIGINAL

No. 66404-2-1

COURT OF APPEALS OF WASHINGTON - DIVISION ONE

**TIMOTHY SMITH and SHERRI SMITH, husband and wife, and the
marital community comprised thereof,**

Appellants,

v.

**FRYE BUILDING LIMITED PARTNERSHIP, a Washington
Limited Partnership,**

Respondent.

On appeal from King County Superior Court
No. 09-2-31300-8 SEA
Hon. Joan E. Dubuque

**REPLY BRIEF OF APPELLANTS
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TABLE OF CONTENTS

TABLE OF CONTENTS **i**

TABLE OF AUTHORITIES **iii**

ARGUMENT **1**

1. Standard of Review **2**

2. Fundamental Duty of a Property Owner to Maintain a Safe Premises **3**

3. Relationship of the Defendant and Employer - Vicarious Liability **4**

A. Frye and the Plaintiff's Employer, AHA, maintained an express Principal-Agent relationship. **4**

B. A Property Owner May Not Evade Liability to Third Persons for Dangerous Conditions by Delegating Property Management to an Independent Contractor. **5**

C. The Defendant Retained Control Over the Manner in Which AHA Performed Its Work and Therefore Owed the Plaintiff a Non-delegable Duty to Ensure a Safe Workplace. **7**

3. Breach and Causation - How the Defendant Caused the Plaintiff's Injuries **10**

A. The Generally Poor Condition of the Property, the Systematic Under-funding of Maintenance, and the Defendant's Prioritizing "Curb Appeal" Over Safety Caused the Plaintiff's Injury. ... **10**

**B. The Plaintiff's Workplace Was Unsafe Under
WISHA Core Rules 15**

**(C) General Notice of the Hazardous Condition of
the Building as a Whole 17**

CONCLUSION 18

TABLE OF AUTHORITIES

Afoa v. Port of Seattle, 160 Wn. App. 234, 247 P.3d 482 (2011) 7

Baxter v. Morningside, Inc., 10 Wn. App. 893, 521 P.2d 946 (1974) 8

Carlson v. P.F. Collier & Son Corp., 190 Wash. 301, 67 P.2d 842 (1937)
..... 4

Curtis v. Lien, 169 Wn.2d 884, 239 P.2d 1078 (2010) 12

Fleming v. City of Seattle, 45 Wn.2d 477, 275 P.2d 904 (1954) 17

Fredrickson v. Bertolino’s Tacoma, Inc., 131 Wn. App. 183, 127 P.3d 5
(2005) 3

Griffiths v. Henry Broderick, Inc., 27 Wn.2d 901, 182 P.2d 18 (1947),
overruled on other grounds by Jones v. Strom Const. Co., Inc., 84 Wn.2d
518 (1974) 5, 6

Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002) . . 7, 9,
10

Moss v. Vadman, 77 Wn.2d 396, 463 P.2d 159 (1969) 8

O’Brien v. Hafer, 122 Wn. App. 279, 93 P.3d 930 (Div. I 2004) 8

Pagarigan v. Phillips Petroleum Co., 16 Wn. App. 34, 552 P.2d 1065
(1976) 8

Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc., 29 Wn.
App. 311, 627 P.2d 1352 (1981) 4

Smith v. Safeco Ins. Co., 150 Wn.2d 478, 78 P.3d 1274 (2003) 3

Thomas v. Housing Authority of City of Bremerton, 71 Wn.2d 69, 426
P.2d 836 (1967) 3, 17

Tincani v. Empire Zoological Soc., 124 Wn.2d 121, 875 P.2d 621 (1994) 13

WAC 296-800-100 15

WAC 296-800-110 15

WAC 296-800-11005 15

WAC 296-800-11010 15

WAC 296-800-11035 16

ARGUMENT

The Defendant Frye Building Limited Partnership, which owned the premises where the Plaintiff Timothy Smith was injured on accumulated water due to a broken laundry room sink drain, failed to exercise reasonable care in maintaining the building where the injury occurred. The Defendant attempted to delegate maintenance duties of the premises, commonly known as the “Frye Building,” to an agent, the Archdiocesan Housing Authority (“AHA”), which employed the Plaintiff as Facility Manager, but failed to monitor whether AHA was keeping the building safe. It also promised AHA that it would adequately fund the maintenance effort; however, it diverted profits from the building to other social services projects instead. Proper funding and enforcement of the maintenance program would have prevented the Plaintiff’s injury. The Plaintiff, further, was fault-free for his fall.

Several elements of the Respondent’s Brief warrant strict Reply. These elements include (a) the proper standard of review; (b) whether and on what basis the Defendant Frye Building Limited Partnership should be held liable for any negligence on the part of the Plaintiff’s employer, AHA; (c) whether Frye owed the Plaintiff a non-delegable statutory duty

to ensure a safe workplace pursuant to applicable codes; and (d) whether any neglect or breach on the part of Frye, or any neglect or breach for which Frye must be held vicariously liable, proximately caused the Plaintiff's injuries.

1. Standard of Review

The standard of review applicable to this case is *de novo* review of the trial Court's order granting Summary Judgment. Under RAP 2.4(c), the appellate Court reviews the final judgment in a case, even where not designated in the Notice of Appeal, where the Notice designates a Motion for Reconsideration of the final judgment. In other words, since the Appellants Moved for Reconsideration of the trial Court's Order Granting Summary Judgment and designated the denial of the Reconsideration in their Notice, the Order Granting Summary Judgment is included in the scope of review on appeal. This interpretation is further supported by RAP 5.3(e), which extends the deadline for filing a Notice of Appeal based on an Order Granting Summary Judgment where the aggrieved party moves for Reconsideration at the trial court level. On appeal, the standard of review of an Order of Summary Judgment is *de novo*, and the appellate

court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

2. Fundamental Duty of a Property Owner to Maintain a Safe Premises

It is essentially agreed among the parties that Frye, as a property owner, owed the Plaintiff a duty to maintain a safe premises. The Defendant owned the Frye Building, so it is liable to the Plaintiff, an invitee, for injuries caused by a condition on the land when it knew, or should in the exercise of reasonable care have known, that the condition presented an unreasonable risk of harm; could not reasonably expect its invitees to realize the risk themselves; and failed to make the condition reasonably safe or warn the invitee. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 127 P.3d 5 (2005). For a defendant to be held liable for maintaining a dangerous condition, proof as to foreseeability of the particular manner or nature of the occurrence is not necessary; it is sufficient if the general type of danger is reasonably foreseeable. *Thomas v. Housing Authority of City of Bremerton*, 71 Wn.2d 69, 72, 426 P.2d 836 (1967). The primary dispute among the parties is whether Frye breached that duty and whether any breach proximately caused the Plaintiff's injury.

**3. Relationship of the Defendant and Employer -
Vicarious Liability**

**A. Frye and the Plaintiff's Employer, AHA,
maintained an express Principal-Agent relationship.**

The Respondent contends that Frye and the Plaintiff's employer, AHA, were contractually designated as independent contractors in the Management Agreement. That is true. But it is also true that Frye voluntarily and expressly designated AHA as its Agent in the Management Agreement. CP 30. The two designations are not mutually exclusive, and AHA's status as an independent contractor does not relieve Frye of its responsibility, as AHA's Principal, for AHA's acts and omissions committed within the course and scope of its agency relationship that produced injury to third persons and does not AHA's knowledge from being imputed to Frye. *Carlson v. P.F. Collier & Son Corp.*, 190 Wash. 301, 316, 67 P.2d 842 (1937); *Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.*, 29 Wn. App. 311, 316-7, 627 P.2d 1352 (1981).

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**B. A Property Owner May Not Evade Liability to
Third Persons for Dangerous Conditions by Delegating
Property Management to an Independent Contractor.**

A property management contract purporting to delegate a property owner's maintenance responsibilities to a manager like AHA does not absolve the property owner of its duties to maintain a safe premises; the delegation is simply inapplicable to third-parties who are injured on the premises. *Griffiths v. Henry Broderick, Inc.*, 27 Wn.2d 901, 909-10, 182 P.2d 18 (1947), *overruled on other grounds by Jones v. Strom Const. Co., Inc.*, 84 Wn.2d 518 (1974). *Griffiths* involved a premises liability claim against a property owner, Griffiths, who had delegated property management duties to an agent, Henry Broderick, Inc. The Court explained that the contract did not influence the rights of third-parties:

No third person's rights were affected by either contract. The contract of the parties in the instant case does not purport to, and could not possibly, affect or in any way limit the right of recovery of any person injured by the negligent condition of the Griffiths premises. The Loggins chose to sue the owner of the building, that is, the plaintiff in this action. We assume that he did not plead the management contract as a defense, and we may affirm, with complete confidence, that, if he did, it was stricken from the pleadings. Neither could Henry Broderick, Inc., have pleaded the management contract as a defense had the Loggins brought suit against it. The management contract

directly affects the rights of the parties to it only, that is no say, the parties to this case, and no other persons.

Id. at 909. The Defendant alleges that *Griffiths* does not apply because the *Griffiths* plaintiff had no involvement whatsoever with contracting to manage the property, while the Plaintiff in this case was the building's maintenance supervisor. But in this case the Plaintiff was still simply an employee of AHA; he was no more involved in "contracting" to manage the property than the invitee *Griffiths* Plaintiff. He was not a signatory to the contract; he was not a shareholder in AHA, and he was not even employed by AHA until years after the agreement was signed. He is within the class of third parties covered by the *Griffiths* reasoning cited above. The fact that he was maintenance supervisor may be relevant to comparative fault, a factual question, but the *law* does not permit the Management Agreement between AHA and Frye to substitute AHA or the Plaintiff for the Frye in its role as building owner and party ultimately responsible for the condition of the building.

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**C. The Defendant Retained Control Over the
Manner in Which AHA Performed Its Work and Therefore
Owed the Plaintiff a Non-delegable Duty to Ensure a Safe
Workplace.**

For all work sites, the well-known and exhaustively-litigated exception to the general rule for non-liability for injuries to employees of independent contractors arising from workplace safety rule violations is where the party seeking to avoid liability “retained control” over the means and methods by which the employer performed its work. In such a case, the superior contracting party - the Defendant in this case - is *per se* liable for injuries that result from workplace safety rule violations. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 126, 52 P.3d 472 (2002); *Afoa v. Port of Seattle*, 160 Wn. App. 234, 247 P.3d 482 (2011). This is not a matter of mixing construction-site law with premises liability law. While there are WISHA regulations applicable to construction sites, there are also WISHA regulations applicable to all work sites; while there are cases concerning the non-delegable duty of a property owner for the safety of a work site in the construction context, the existence of that duty is not *limited* to construction sites. Neither the *Kamla* nor the *Afoa* case

involved general contractors. The Court analyzed whether a premises owner owed a non-delegable duty to a subcontractor employee outside the construction site context based on the “retained control” exception and the fairness of requiring the class of property owner at issue to be subject to enforcing WISHA violations based on whether it had the expertise in job site management to do so.

The parties in this case established an express agency relationship, and therefore the Defendant retained control over AHA’s work as a matter of law. It is well-settled that in a principle-agent relationship, the primary characteristic is the principle’s right to control the manner in which the agent performs its duties. *Moss v. Vadman*, 77 Wn.2d 396, 402-3, 463 P.2d 159 (1969); *O’Brien v. Hafer*, 122 Wn. App. 279, 281, 93 P.3d 930 (Div. I 2004) (citing *Baxter v. Morningside, Inc.*, 10 Wn. App. 893, 896-97, 521 P.2d 946 (1974)). Crucially to this case, Washington law holds that *it is the right to control, not its exercise, that is decisive*. *Id.* at 284 (citing *Pagarigan v. Phillips Petroleum Co.*, 16 Wn. App. 34, 37, 552 P.2d 1065 (1976)). Here, the parties expressly consented and established in their property management contract that AHA would act on the Defendant’s behalf as its agent. Therefore, both parties consented and

established that the Defendant retained the right to control the manner in which AHA performed its work. Further evidence of the Defendant's retained control over AHA's means and methods is present elsewhere in the Management Agreement: the Defendant was responsible for the expense associated with maintaining the building in a safe condition; CP 28; *the Defendant retained responsibility for determining the condition of the premises that it considered to be acceptable*; CP 28; and the Defendant reserved the right to approve or disapprove yearly property management budgets; CP 29. Whether the Defendant actually exercised its right to control AHA's means, methods, and priorities is immaterial (the fact that it did *not* turns out, in this case, to be negligence); the express agency relationship alone gave the Defendant the right to control if it chose to exercise it.

Moreover, the Defendant is not among the class of property owners that the *Kamla* Court sought to protect. The Defendant in this case is not an ignorant corporation; its general partner and sole governor, the Low Income Housing Institute, is an experienced property manager. The Frye Building was one of the only properties in LIHI's vast real estate holding that it did not manage itself. *LIHI has recently taken over management of*

even the Frye Building. CP 135. LIHI's staff, acting in their capacity as agents of the Defendant, have perfectly adequate knowledge about WISHA compliance in property management and are, therefore, not in the class of Defendants that the *Kamla* court sought to protect.

3. Breach and Causation - How the Defendant Caused the Plaintiff's Injuries

A. The Generally Poor Condition of the Property, the Systematic Under-funding of Maintenance, and the Defendant's Prioritizing "Curb Appeal" Over Safety Caused the Plaintiff's Injury.

The Defendant, both independently and through AHA's carelessness, violated the Defendant's duty to provide the Plaintiff with a safe premises in which to work. The Frye Building was in a state of catastrophic disrepair when the Plaintiff Timothy Smith took over as Facility Manager just two months before he was injured. AHA did not take reasonable steps to ensure that staffing was adequate or that systemic repairs were addressed to allow sufficient time to properly address more minor issues.

Moreover, according to Ms. Gonzalez, AHA was aware of water leakage in the laundry room for a long time *from sources besides the P-trap that failed on the day the Plaintiff was injured* before the Plaintiff arrived at the Frye Building, but in all that time it did nothing to ameliorate the slip-and-fall risk that water leakage presented to residents and employees. The day he was injured was the first time the Plaintiff had encountered water on the laundry room floor. It may have been the first time the P-trap had leaked. However, it was not the first time the laundry room had been dangerous, and the leak in the P-trap was a reasonably foreseeable risk. The trial court should not have excused the Defendant's persistent and obvious failure to fund the building's maintenance program and set priorities for maintenance that would have made the accident less likely to happen by promoting more rigorous inspection of building safety components like the P-trap, installation of mats on the laundry room floor, or notifying the Plaintiff of well-known slip hazards instead of instructing him to focus on unit turn-overs so that he could do his job to ameliorate the risk. If either AHA or the Defendant had mitigated the hazard or warned Mr. Smith about it, the injury would not have happened. AHA did not warn Mr. Smith about the water leakage in the laundry room or advise

him that it was a critical issue to address. Rather, AHA tasked the Plaintiff with improving the rate of unit turn-overs to preserve high-occupancy and rental revenues; according to Ms. Gonzalez, he spent the months preceding his injury dealing with even more pressing matters that had long been neglected by the maintenance staff that preceded him.

Finally, AHA maintenance technicians were responsible for repairing the P-Trap in the laundry room sink that failed on the day the Plaintiff was injured and caused the water leak on which he slipped in the first place. They did so using substandard methods and materials, causing the drain to fail and leak.

The principles of *res ipsa loquitur*, recently applied in *Curtis v. Lien*, 169 Wn.2d 884, 239 P.2d 1078 (2010), apply in this case. The Court refused to find that the record contained direct evidence that the P-trap was negligently installed or maintained; however, that level of proof is not required under Washington law.

The Plaintiff's deposition testimony, presented in the Summary Judgment proceeding, established that, before the Plaintiff arrived at the Frye Building, AHA, as the Defendant's agent, installed a plastic P-trap on a high-water-volume industrial utility basin used, in part, for dumping

large quantities of mop-bucket water; and that after he was injured by this hazardous condition, the Plaintiff, having 30 years of building maintenance experience, replaced the P-trap with a strong, metal version that has since held securely in place.

The jury should be entitled to infer from the P-trap's failure itself that a stronger piece should have been installed long before the Plaintiff was injured; and also that the P-trap should have been subject to inspections to determine its integrity. *See Tincani v. Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) ("Reasonable care requires the landowner 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.'"). Daily mopping by a custodian with no knowledge of plumbing fixtures does not constitute appropriate inspection of the drain component that failed in this case.

As the Defendant's agent, AHA's careless acts and omissions, not only in terms of prioritizing the maintenance program's work, but also in terms of directly addressing water leakage in the laundry room, are imputable to the Defendant.

Even if the Defendant was not responsible for AHA's carelessness, the Defendant should be held liable for the Plaintiff's injuries because the Defendant itself failed to discharge its own direct responsibilities in maintaining the premises. The Defendant promised AHA that it would adequately fund the maintenance program. All maintenance was to be done at the Defendant's expense pursuant to a budget that the Defendant reserved the right to approve; and the condition of the premises was to be maintained in a manner acceptable to the Defendant. CP 28. However, according to Tamara Gonzazlez, AHA made the Defendant well-aware of the serious capital needs of the Frye Building as well as the maintenance department's inability to address necessary repairs given the budget available, and the Defendant nonetheless required AHA to operate with a skeleton crew of maintenance custodians, technicians and managers. Worse, the Defendant had every opportunity to properly fund the maintenance program because the Frye Building produced hundreds of thousands of dollars per year in net revenue according to AHA's budget documents, but the Defendant chose to divert those resources to other projects in its umbrella of overall social services. CP 71-97, 120.

The parties agree that the Defendant did not concern itself with minor repair needs of the Frye Building, but rather with major capital needs and, according to Sharon Lee, Executive Director of the Low Income Housing Institute (the Defendant's sole and General Partner), the building's "curb appeal." CP 119. That is not the behavior of a diligent property owner.

B. The Plaintiff's Workplace Was Unsafe Under WISHA Core Rules

The Plaintiff's employer failed to provide him with a safe place to work under Washington's workplace safety regulations, and the Defendant failed to ensure compliance with the same. WISHA Core Rules apply to all employers. WAC 296-800-100. AHA was responsible for providing the Plaintiff with a safe workplace free from recognized hazards. WAC 296-800-110; WAC 296-800-11005. AHA was required to do everything reasonably necessary to protect the life and safety of its employees. WAC 296-800-11010. But AHA knew that the laundry room utility basin had leaked before, AHA staff repaired it poorly before Mr. Smith arrived, and AHA staff further knew that water leakage was a common problem from multiple sources in the laundry room and never warned Mr. Smith about

the same. AHA was required to “Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.” WAC 296-800-11035. Instead, AHA had no system for identifying minor problems that were likely to cause injury except for the work order system that required the problem to arise before it was addressed, leaving a gap in time when the hazard was present between its discovery and its resolution. AHA further failed to provide staffing sufficient to cover the various competing priorities to which its maintenance department was subjected, e.g., unit turn-overs, major mechanical and sanitary projects, enhancing “curb appeal,” responding to resident work orders, etc.

The Defendant is at least partially to blame for these violations. AHA pled with the Defendant for proper funding since the Frye Building was a revenue-positive enterprise, but the Defendant “tightened the screws” on operations instead. Therefore the Defendant both actively and passively breached its duty to ensure that the Plaintiff had a safe place to work.

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**(C) General Notice of the Hazardous Condition of
the Building as a Whole**

The Plaintiffs restate the rule cited above, that for a defendant to be held liable for maintaining a dangerous condition, proof as to foreseeability of the particular manner or nature of the occurrence is not necessary; it is sufficient if the general type of danger is reasonably foreseeable. *Thomas v. Housing Authority of City of Bremerton*, 71 Wn.2d 69, 72, 426 P.2d 836 (1967) (citing *Fleming v. City of Seattle*, 45 Wn.2d 477, 275 P.2d 904 (1954)). Even if the Defendant - even if no one - was aware that the P-trap that leaked the morning the Plaintiff was injured posed a specific hazard to the Plaintiff that morning, the Defendant is not relieved of liability. Both AHA and the Defendant were aware that the Frye Building suffered from major safety issues across multiple independent systems. Given the Defendant's fiscal priorities regarding its management; given AHA's priorities ensuring prompt unit turn-over at the expense of other pressing projects; given Ms. Gonzalez's opinion that having a crew dedicated to unit turn-over would have freed up valuable time for the existing maintenance staff to address needed repairs in a timely and proper manner, the Defendant's properly funding the

maintenance program instead of maximizing the building's net revenues for use in other projects would have prevented the injury.

CONCLUSION

In Washington, a building owner familiar with property management should not be allowed to overlook its duty to provide a safe premises and workplace merely by delegating that responsibility to someone else, particularly where it engaged in years of neglect, focusing on the building's "curb appeal" and "tightening the screws" on funding for building operations when the building produced sufficient revenue to maintain it in a safe condition and the company to which it attempted to pass the buck regarding safety consistently complained that the owner was not providing sufficient resources for the manager to carry out its contractual obligations.

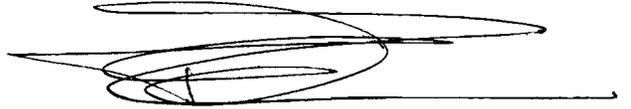
The Plaintiff Timothy Smith's injury, or one like it, was an inevitable consequence of the pattern and practice of gross neglect and greed on the part of the Defendant, and excusing the Defendant for the Plaintiff's injury excuses its knowing and wanton disregard for safety at the Frye Building.

When the evidence is viewed in the light most favorable to the Plaintiffs, there are genuine issues of material fact regarding the Defendant's actual or constructive knowledge of the hazardous condition and the Defendant's failure to maintain the premises and maintain a safe workplace for the Plaintiff.

Dismissing the Plaintiffs' claims and excusing this inexcusable behavior does not further the interests of justice, the trial court erred in granting the Defendant's Motion for Summary Judgment, and the dismissal should be reversed.

Dated: 05 / 03 / 2011

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COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

TIMOTHY SMITH and SHERRI SMITH,
husband and wife, and the marital community
comprised thereof,

No. 66404-2-1

CERTIFICATE OF SERVICE

Plaintiff(s)/Appellants,

v.

FRYE BUILDING LIMITED
PARTNERSHIP, a Washington Limited
Partnership,

Defendant(s)/Respondents.

I certify under the penalty of perjury under the laws of the State of Washington that on
this date I caused to be served via U.S. Mail, postage pre-paid, to

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Court of Appeals: Division I
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CERTIFICATE OF SERVICE

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PAGE 1 of 2

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28 PAGE 2 of 2

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