No. 47462-0-II

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.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Angel Garcia-Titla sued Respondent SFC Homes in March 2014, alleging SFC Homes was liable for an alleged worksite incident. Plaintiff's theory of the case was that SFC Homes was either the general contractor or an "owner in control" of the worksite. SFC Homes answered, denying plaintiff's claims that it was general contractor and denying it was an owner in control or that it had any liability as the owner of the property in question. Garcia-Titla engaged in no written discovery and took no depositions. SFC Homes moved for summary judgment dismissal, arguing it was owed no common law duty to maintain a safe worksite as the owner of the jobsite because SFC Homes had no right to control the manner in which the framing work was performed. SFC further argued it was not the general contractor on the worksite, nor did it retain control over the worksite as the owner of the site, and therefore it was not subject to *Stute* liability for worksite incidents. SFC Homes further argued that even if the Court were to engage in a *Stute* analysis, which it should not, plaintiff had presented no evidence of any applicable WISHA violation. Finally, SFC Homes argued plaintiff had presented no evidence of any negligence, and no evidence that any alleged act or omission by SFC Homes caused the incident in question.

In response to the summary judgment motion, Garcia-Titla failed to present evidence to create a genuine issue of material fact that (1) SFC Homes was the general contractor for the subject project or (2) SFC Homes exercised control over the manner in which work was performed on the jobsite. In addition, and critically, Garcia-Titla presented no evidence in response to the summary judgment motion of a WISHA or WAC violation, or any evidence that SFC Homes in any way caused the alleged incident.

The trial court granted SFC Homes's motion and dismissed Garcia-Titla's claims.

Garcia-Titla moved for reconsideration in the trial court. However, the new evidence submitted on the reconsideration motion was readily available to Garcia-Titla prior to the summary judgment hearing. The purpose of reconsideration is not to permit the losing party to have a second chance at presenting evidence to support their claim, and Garcia-Titla did not provide a sound basis under Civil Rule 59 for the Court to consider the additional materials. Where Garcia-Titla failed to make a showing that any of the grounds for reconsideration under CR 59(a) applied, his motion for reconsideration was properly denied. This court likewise should disregard the improperly submitted evidence and should affirm the trial court's award of summary judgment to SFC Homes.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Should this court affirm the trial court's summary judgment dismissal of Garcia-Titla's claims against SFC Homes, where SFC Homes owed no common law duty to maintain a safe worksite as the owner of the jobsite because SFC Homes had no right to control the manner in which the framing work was performed?

2. Should this court affirm the trial court's summary judgment dismissal of Garcia-Titla's claims against SFC Homes, where SFC Homes owed no duty to ensure compliance with WISHA regulations because:

   a. SFC Homes was the jobsite owner/developer and did not retain control over the work being done by the framer on the site.

   b. No per se liability for "owner/developers" exists under *Stute*.

   c. SFC Homes was not the general contractor on the worksite.

   d. Garcia-Titla failed to present evidence of any violations of specific WISHA provisions or WAC codes.

3. Should this court affirm the trial court's summary judgment dismissal of Garcia-Titla's claims against SFC Homes, where Garcia-Titla failed to present any evidence that any WISHA or WAC violation caused his injuries?

4. Should this court affirm the trial court's summary judgment dismissal of Garcia-Titla's claims against SFC Homes, where SFC Homes owed no duty to Garcia-Titla as an invitee on its land and where Garcia-Titla has conceded this point?

5. Should this court affirm the trial court's denial of Garcia-Titla's motion for reconsideration, where:

   a. Garcia-Titla's claimed "misunderstanding" of the issue before the trial court was disingenuous?

b. The evidence Garcia-Titla sought to submit was not "newly discovered" under CR 59(a)(4)?

c. Garcia-Titla has conceded that the contract between FRDS and Henley USA has no bearing on the case, and therefore did not constitute grounds for reconsideration under CR 59(a)(3)?

d. The trial court properly applied *Kamla* and *Stute* based upon the facts before it on summary judgment?

III. COUNTERSTATEMENT OF THE CASE

A. The Worksite Incident

Appellant Angel Garcia-Titla alleges he was injured while working on a jobsite in Gig Harbor, Washington on May 20, 2011. CP at 57. He was employed by FRDS Construction, Inc., a framing contractor that was performing framing work for residential construction on property owned by Respondent SFC Homes, LLC. CP at 55-57, 89, 93, 106.

Garcia-Titla performed the framing work with a team that consisted of Antonio Aguilar, the team leader, and one other worker. CP at 55, 58. Aguilar would direct placement of the materials, and Garcia-Titla and the other worker would perform the actual placement. CP at 60.

The incident occurred while Garcia-Titla was framing the second story. CP at 61. Garcia-Titla was standing on a joist while his coworker was standing on the floor below, handing him pieces of plywood to place over the beams on the second story to create the floor. CP at 61, 66-72.

While Garcia-Titla was attempting to place one of the pieces of plywood, the joist on which he was standing broke, along with one of the metal sustainers on the wall that had been holding up the joist. Garcia-Titla had installed both the joist and the metal sustainer that broke. CP at 60-64. As a result of the joist breaking, Garcia-Titla fell to the ground from a height of approximately eight feet. CP at 62, 80.

After the incident, 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. CP at 101-02.

B. Garcia-Titla Was an Experienced Framer

Garcia-Titla was an experienced construction worker and framer. CP at 84, 92-94. He had worked on two framing projects for FRDS before the project at issue in this case, each of which lasted approximately 15 days. CP at 57. Garcia-Titla had attended safety meetings on those projects, which were overseen by Aguilar and a worksite superintendent. CP at 74-76. At these meetings, Garcia-Titla was instructed as to the placement of ladders, and Aguilar would check that safety shoes and hard hats were being used. CP at 74-75. Garcia-Titla was also instructed that whenever he was at a height of eight feet or higher, he should wear a safety harness. CP at 75-76. He testified that he was aware that if there was no place to tie a harness, alternate fall protection needed to be used,

which involved placing two by fours around the work area to hold on to. CP at 77-78.

Garcia-Titla was working at a height of over eight feet at the time of the incident and was wearing a harness that had been provided to him by FRDS. CP at 80, 83. According to his testimony, Garcia-Titla had not tied the harness to the structure because he was not high enough. CP at 82-83.

C. SFC Homes Did Not Retain Control Over the Framing

SFC Homes had no knowledge of or expertise in framing, and therefore relied on the expertise of FRDS, which held itself out as an expert in framing and which was responsible for holding safety meetings on the project. CP at 79-80, 106. SFC Homes was not involved in the framing work, had no actual control over the framing work, and had no right to control that work. CP at 106. Further, SFC Homes did not participate in construction work on the project, did not control any of the work performed by any subcontractor on the project, and did not have the right to control the work performed by any subcontractor. *Id.*

D. Procedural History

On March 11, 2014, Garcia-Titla filed a complaint in Pierce County Superior Court against SFC Homes, alleging that SFC Homes

breached its duty to maintain a safe workplace. CP at 1-3. Trial was set for March 10, 2015. CP at 49.

The discovery cutoff was January 20, 2015. CP at 49. SFC Homes served written discovery on Garcia-Titla, including a request that Garcia-Titla state each and every fact upon which he relied to support his claim that SFC Homes, LLC was the general contractor for the project. CP at 95. Garcia-Titla responded, "Plaintiff will be requesting Safety meeting minutes, walk around Safety inspection notes, a Site specific safety plan, and a Safety manual from the General Contractor and will supplement this Answer upon receipt." *Id.*

In response to the request for production asking Garcia-Titla to produce any and all materials supporting his answer, Garcia-Titla produced only a printout from the Pierce County Assessor-Treasurer's website showing that SFC Homes was the owner of the land. CP at 89. That SFC Homes owned the land is not in dispute.

SFC Homes also asked Garcia-Titla to state each and every fact upon which he relied to support his claim that SFC Homes owed Garcia-Titla a duty, breached that duty, and caused his damages. Garcia-Titla responded, "The General Contractor owes the duty to provide a safe place to work to every worker on his job site, Plaintiff was a worker at this jobsite. Therefore, plaintiff was owed this duty. The general contractor

breached this duty." CP at 95-96. In other words, the basis for Garcia-Titla's claim against SFC Homes was his assumption that SFC Homes was the general contractor for the jobsite, for which no evidence existed in the record.

On January 8, 2015, SFC Homes moved for summary judgment dismissal of Garcia-Titla's claims. CP at 10. SFC Homes argued that it owed no duty to Garcia-Titla for worksite safety because SFC Homes was an owner, not a general contractor, and therefore had no duty to ensure compliance with WISHA regulations under *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 463-64, 788 P.2d 545 (1990). CP at 21-23. SFC Homes further argued that because it did not retain control over the worksite, it owed no common law duty of care to ensure Garcia-Titla's safety under *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002). CP at 18-20. SFC Homes argued there is no evidence of any WISHA violations, and further the evidence showed that no WISHA violations were issued. CP 21, 101-102, 488-490. SFC Homes additionally argued that it owed no duty as a premises owner under the Restatement, a point which Garcia-Titla conceded. CP 24-27. SFC Homes further argued that Garcia-Titla had failed to establish that SFC Homes in any way caused Garcia-Titla's alleged injuries. CP at 27-28.

In his opposition, Garcia-Titla asserted that SFC Homes was the general contractor on the project, but failed to submit evidence in support. He relied on (1) a Pierce County Assessor-Treasurer's website document produced in discovery that stated that SFC Homes was the *owner* of the property;[1] (2) documentation that SFC Homes had a general contractor's license[2]; (3) website printouts stating SFC Homes and its parent company were engaged in single-family housing construction work[3]; and (4) documentation indicating that Atsushi Iwasaki, the president of SFC Homes's parent company, was also the manager of another company that engaged in single-family housing construction work.[4] However, Garcia-Titla produced no evidence that SFC Homes was the general contractor on the project at issue, and failed to set forth any evidence that any WISHA violations occurred on the jobsite.

Garcia-Titla further argued that even if SFC Homes was not the general contractor, it was an "owner in control" of the property and was therefore liable. CP at 114-15, 119-21. However, Garcia-Titla set forth no specific facts demonstrating that SFC Homes had the right to control

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[1] CP at 125.
[2] CP at 130, 132 (L&I website printouts).
[3] CP at 138 (Department of Revenue printout stating that SFC Homes engaged in "new single-family housing construction"); CP at 144 (printout from Sumitomo Forestry Co., Ltd.'s website stating that SFC Homes engaged in "[c]onstruction and subdivision sales of detached houses").
[4] CP at 140 (Secretary of State listing for Creekstone Development, listing Iwasaki as manager); CP at 142 (stating that Creekstone engages in "new single-family housing construction").

the worksite, other than the abovementioned documentation that SFC Homes owned the property in question. Garcia-Titla also entirely failed to present evidence as to what, if any, WISHA requirements or WAC provisions were violated, or how any such violation caused his alleged injuries.

The trial court granted SFC Homes's motion and dismissed Garcia-Titla's claims. CP at 172-73.

Garcia-Titla moved for reconsideration, arguing that he misinterpreted the issue before the court on summary judgment.[5] Garcia-Titla claimed that he had subsequently discovered evidence obtained from the City of Gig Harbor showing that SFC Homes was the general contractor on the property, and submitted that evidence with his motion for reconsideration. CP at 176-77. However the evidence was a 2011 record that not "newly discovered" and the trial court properly disregarded it.

Garcia-Titla further claimed that the court should reconsider its ruling in light of SFC Homes's statement during the summary judgment oral argument that it possessed the contract governing the parties' relationship. CP at 176. The trial court ultimately ordered that that

[5] He claimed that he believed that the issue was whether SFC Homes was "a" general contractor, not whether it was "the" general contractor for the project at issue. CP at 174-76.

contract be produced, and 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. CP at 376-77, 410.

Garcia-Titla additionally moved for reconsideration by arguing that the trial court improperly applied *Kamla* and *Stute* because the court assumed that SFC Homes was not the general contractor. He also claimed that substantial justice had not been done because the jury should be allowed to decide whether WISHA violations had occurred. In support of this claim, Garcia-Titla submitted testimony by his safety expert that was readily available to him at the time of summary judgment, but which Garcia-Titla failed to submit to the court. CP at 183-92.

After considering supplemental briefing regarding the effect of the late-submitted Gig Harbor public records and after reviewing the contract identified by SFC Homes at oral argument, the trial court denied the motion. CP at 366-423. Garcia-Titla's appeal followed. CP at 480.

IV. SUMMARY OF ARGUMENT

As the property owner/developer, SFC Homes owed no common law duty to Garcia-Titla because Garcia-Titla was the employee of an independent contractor, FRDS, and SFC Homes did not retain the right to direct the manner in which the independent contractor performed its work.

Nor did SFC Homes as jobsite owner have a duty to ensure compliance with WISHA where it did not retain the right to control the manner in which an independent contractor completes its work. Garcia-Titla argues that SFC Homes was the general contractor, but the evidence he presented in response to the summary judgment motion did not support this contention. Further, while SFC Homes denies it was acting as general contractor or that it retained control over the framing work on this property, Garcia-Titla failed to identify a specific WISHA violation to bring the claim under *Stute*. Because no WISHA violations occurred, no *Stute* liability can lie as a matter of law. Further, even if this court were to hold that (1) SFC Homes was the general contractor or retained the right to control the work in this case and (2) Garcia-Titla had established the violation of specific WISHA regulations, this court should nevertheless affirm the trial court's dismissal of Garcia-Titla's claims because Garcia-Titla failed to establish an issue of material fact with respect to causation.

Finally, Garcia-Titla's motion for reconsideration was not brought on proper grounds and was an improper attempt to submit new evidence in response to the summary judgment motion in support of his claims, all of which was available prior to the summary judgment motion. The evidence submitted on the reconsideration motion should be disregarded.

V. ARGUMENT

A. Standard of Review

The Court of Appeals reviews a trial court's ruling on summary judgment de novo, engaging in the same inquiry as the trial court. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Thus, the court "will affirm an order of summary judgment when 'there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007)); CR 56(c). The court must "review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party is a defendant and meets this burden, the burden shifts to the plaintiff to bring forth "specific facts showing that there is a genuine issue for trial." *Rathvon v. Columbia Pac. Airlines*, 30 Wn. App. 193, 201, 633 P.2d 122 (1981). 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,'" then the trial court should grant the defendant's motion. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*,

146 Wn.2d 370, 382, 46 P.3d 789 (2002) (internal quotation marks omitted) (quoting *Young*, 112 Wn.2d at 225).

Garcia-Titla also challenges the trial court's denial of his motion for reconsideration. Appellate courts review rulings on motions for reconsideration for abuse of discretion. *Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

B. SFC Homes Did Not Owe Garcia-Titla a Common Law Duty To Maintain a Safe Worksite because SFC Homes Did Not Retain Control over the Worksite.

SFC Homes was the property owner/developer. SFC Homes owed no common law duty to Garcia-Titla because Garcia-Titla was the employee of SFC Homes's independent contractor, FRDS. At common law, an entity that retains an independent contractor to perform work on a jobsite is generally immune from liability for injuries sustained by the employees of the independent contractor. *Kamla*, 147 Wn.2d at 121. An exception to this rule arises when the entity retains the right to direct the manner in which the independent contractor performs its work. *Id.*

To determine whether an entity has retained the right to control the work of an independent contractor, Washington courts follow the Restatement (Second) of Torts, which provides:

> The employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work

> stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Kamla, 147 Wn.2d at 121 (quoting RESTATEMENT SECOND OF TORTS § 414 cmt. c (1965)). In evaluating whether a jobsite owner had the right to control the work on the jobsite, courts must "look beyond evidence of inspections, demands of contract compliance, suggestions or recommendations that did not necessarily need to be followed, prescriptions of alterations and deviations, receipt of reports, and authority to stop work or resume work." *Cano-Garcia v. King County*, 168 Wn. App. 223, 234-35, 277 P.3d 34 (2012).

In *Kamla*, our Supreme Court held that The Space Needle Corporation did not have the right to exercise control over the work of Pyro-Spectaculars, an independent contractor hired to install a fireworks display at the Space Needle, sufficient to overcome common law immunity from liability for injuries sustained by one of Pyro's employees. 147 Wn.2d at 121-22. The Court reasoned:

> Space Needle simply agreed to provide Pyro a suitable display site and fallout zone, access to the display site to set up the display, adequate crowd control, firefighters, and

> permit fees. Space Needle also agreed to provide "Access to the site; Technical assistance and support; Security and fencing as determined by the Seattle Fire Department; Public broadcast, [and]; Public relations." ... Space Needle did not retain control over the manner in which Pyro installed the fireworks display or completed its work. As an independent contractor, Pyro was free to do the work in its own way.

Id. at 122 (alteration in original).

Even where a landowner has the right to accept or reject work or safety plans or cancel work, courts have held that something more is required before liability will be imposed for injuries to an independent contractor's employees. See, e.g., *Cano-Garcia*, supra. In *Cano-Garcia*, King County hired KST as its general contractor to construct a wastewater treatment facility on property owned by the County. 168 Wn. App. at 227-28. Plaintiff Cano-Garcia, an employee of KST, sued the County after suffering injuries on a concrete pour being performed by KST. *Id.* at 228-29. Division Two affirmed the trial court's summary judgment dismissal of Cano-Garcia's claims, holding the County did not retain the right to control the manner in which work was performed on the jobsite. *Id.* at 237. The court reasoned that under the contract between the County and KST,

> while King County could accept or reject plans and work and could even order that work be stopped for imminent hazards, King County had no authority to tell KST how to perform its obligations under the contracts.

> It is apparent that the parties' intent under the contractual language was that KST should have control over the workers' safety. Although the contract language provided for inspections to ensure compliance with the contract and relevant laws and regulations and stop work authority if an imminent threat to safety arose, those powers alone are not enough to constitute retained control. The limited general control Jacobs and King County retained in the contract did not create a duty on their part to inspect Cano-Garcia's protective clothing before he stepped into the concrete pour.

Id.

In addition, Washington courts have held that the right to inspect an independent contractor's work, to demand contract compliance, or to order work stopped does not constitute "retained control" over the subcontractor's operations. See *Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991) ("The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship."). The *Hennig* court reasoned, "It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the performance of the work as to undertake responsibility for the safety of the independent contractor's employees." *Id.*; see also *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 663, 240 P.3d 162 (2010) ("The employer does not retain control by controlling the timing or order of work, by retaining the right to order the work stopped, or by inspecting the contractor's work

to ensure adequate progress."); *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 447, 711 P.2d 1090 (1985) ("[G]eneral contractual rights [such] as the right to order the work stopped or to control the order of the work or the right to inspect the progress of the work do not mean that the general contractor controls the method of the subcontractor's work.").

Here, as the owner of the property in question, SFC Homes did not have a duty with respect to the safety of FRDS's employees, where it did not retain control over the manner in which the framing work was performed. See *Kamla*, 147 Wn.2d at 121-22. In support of its summary judgment motion, SFC Homes submitted the declaration of Atsushi Iwasaki, the manager of SFC Homes and president of its holding company, stating that SFC Homes had neither actual control over FRDS's work at the jobsite nor retained control over that work. CP at 106. Iwasaki further testified that SFC Homes had no involvement in the framing work being performed on site; rather, control over that work rested solely with FRDS, which held itself out as an expert in framing. *Id.*

Where SFC Homes submitted evidence establishing the absence of a material fact as to whether SFC Homes retained the right to control the work being performed on the jobsite, it was Garcia-Titla's burden to submit evidence establishing the existence of an issue of a material fact on the control issue, an issue on which Garcia-Titla would bear the burden of

proof at trial. See *Right-Price Recreation*, 146 Wn.2d at 382; *Rathvon*, 30 Wn. App. at 201. Garcia-Titla wholly failed to establish the existence of *any* facts establishing that SFC Homes had the right to control FRDS's work. In response to the summary judgment motion, Garcia-Titla merely submitted records showing that SFC Homes owned the property upon which the work was being performed and that it had a contractor's license (neither of which point is disputed). However, none of the documents submitted by Garcia-Titla established that SFC Homes was an "owner in control" of the property. CP at 114-15, 119-21.

Garcia-Titla brought forth *no* facts that SFC Homes retained a right to supervise FRDS's work such that FRDS was "'not entirely free to do the work in his own way.'" *Kamla*, 147 Wn.2d at 121 (quoting RESTATEMENT (SECOND) OF TORTS § 414 cmt. c). To the contrary, the only facts before the trial court on summary judgment was the unrefuted sworn testimony that SFC Homes had no right to control FRDS's work.

The mere fact that SFC Homes owned the property upon which FRDS was performing the work is insufficient to establish control sufficient to bring this case within *Kamla*. Even if the court were to presume that SFC Homes had the right to order work stopped or resumed by virtue of its property ownership, or to inspect the progress of work being performed on its property, or to prescribe alterations to the work,

such "facts" (which have *not* been established by Garcia-Titla) would be insufficient under *Kamla* and the Restatement to satisfy the right to control test. See *Kamla*, 147 Wn.2d at 121 (quoting RESTATEMENT (SECOND) OF TORTS § 414 cmt. c). Garcia-Titla was required to show something more, such as specific evidence showing that SFC Homes assumed responsibility for supervising and coordinating all aspects of the work and for taking responsibility for all safety precautions with respect to the work. Garcia-Titla brought forth no such evidence, and the evidence presented by SFC Homes specifically establishes the *absence* of any such facts. Accordingly, the trial court properly dismissed Garcia-Titla's claims against SFC Homes.

C. SFC Homes Had No *Stute* Duty To Ensure Compliance with WISHA Regulations.

Not only did SFC Homes have no common law duty with respect to Garcia-Titla's safety, but it also had no duty to ensure compliance with worksite safety regulations under WISHA because it was the property owner, not the general contractor. Under *Stute*, the general contractor on a worksite has a non-delegable duty to all workers to ensure compliance with WISHA safety regulations. 114 Wn.2d at 463-64; see also RCW 49.17.060(2). However, jobsite *owners* have a duty to ensure compliance with WISHA only if they retain the right to control the manner in which

an independent contractor completes its work. *Kamla*, 147 Wn.2d at 125. As discussed above, the undisputed facts demonstrate that SFC Homes had no right to control the jobsite. Accordingly, as a jobsite owner, SFC Homes owed no duty to Garcia-Titla as a matter of law to ensure compliance with WISHA regulations.

Notwithstanding the undisputed facts establishing that SFC Homes was the owner, not the general contractor, for the jobsite, Garcia-Titla argues that the evidence it submitted was sufficient to establish that SFC Homes was an "owner/developer" of the property and, therefore, it had the same duties as a general contractor under *Stute*. In making this argument, Garcia-Titla asks this court to disregard the fact-specific inquiry regarding a jobsite owner's right to control the work performed on a jobsite, and his arguments should therefore be disregarded.

1. Garcia-Titla Mischaracterizes *Stute*

As set forth above, the undisputed facts establish that SFC Homes was the jobsite owner, not the general contractor, and that it did not retain the right to control the manner in which FRDS performed its work. Garcia-Titla nevertheless argues that *Stute* and its progeny apply the per se rule established in *Stute* to not only general contractors, but also what Garcia-Titla labels "owner/developers." See generally, Br. of Appellant at 8-16. Garcia-Titla misreads those cases, and his argument that SFC

Homes is per se liable for WISHA violations as an "owner/developer" should therefore be disregarded.

Garcia-Titla's interpretation of *Stute* would impose a per se duty on jobsite owners to ensure WISHA compliance, which is a position not supported by *Stute* or its progeny. See, e.g., *Afoa v. Port of Seattle*, 176 Wn.2d 460, 472, 296 P.3d 800 (2013) (no per se duty imposed on jobsite owners under *Stute*).

Stute's holding is explicit and limited:

> Inasmuch as both the general contractor and subcontractor come within the statutory definition of employer [under WISHA], the primary employer, the *general contractor*, has, as a matter of policy, the duty to comply with or ensure compliance with WISHA and its regulations. A *general contractor's* supervisory authority places *the general* in the best position to ensure compliance with safety regulations. For this reason, the prime responsibility for safety of all workers should rest on the *general contractor*.

114 Wn.2d at 163 (emphasis added). No language in this holding extends the duty to an "owner/developer," as asserted by Garcia-Titla.

Garcia-Titla nevertheless cites two cases, *Doss v. ITT Rayonier Inc.*, 60 Wn. App. 125, 803 P.2d 4 (1991) and *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990), in support of his contention that jobsite owner/developers are per se liable for WISHA violations under *Stute*. See Br. of Appellant at 13. In *Doss*, this court held that a jobsite owner that hired an independent contractor was liable for injuries to the

independent contractor's employee under *Stute* because the court found "no significant difference between an owner-independent contractor relationship and a general contractor-subcontractor relationship." 60 Wn. App. at 127, n. 2. In *Weinert*, Division One held that in that case, "the owner/developer's position [was] so comparable to that of the general contractor in *Stute* that the reasons for the holding in *Stute* [applied]." 58 Wn. App. at 696.

Garcia-Titla argues that these cases establish a per se rule grouping owner/developers into the same category as general contractors for the purposes of *Stute*. However, our Supreme Court has specifically rejected this reasoning. Addressing the issue of extending the *Stute* rule to jobsite owner/developers, the *Kamla* Court held:

> Our first question is whether jobsite owners are per se liable under the statutory requirements of RCW 49.17.060. They are not. Nothing in chapter 49.17 RCW specifically imposes a duty upon jobsite owners to comply with WISHA. The second question is whether jobsite owners play a role sufficiently analogous to general contractors to justify imposing upon them the same nondelegable duty to ensure WISHA compliance when there is no general contractor. We hold they do not.

147 Wn.2d at 123-24.

The *Kamla* Court thus rejected a per se rule enveloping landowner/developers into the ambit of *Stute*, ruling instead that "[i]f a jobsite owner does not retain control over the manner in which an

independent contractor completes its work, the jobsite owner does not have a duty under WISHA to 'comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW].'" 147 Wn.2d at 114 (quoting RCW 49.17.060(2)). Here, SFC Homes is a jobsite owner, and is therefore subject to the fact-specific test set forth in *Kamla*. Any rule set forth in cases preceding *Kamla* that would apply a per se rule to owners/developers was overruled by *Kamla* and should be disregarded by this Court.

Here, SFC Homes reasonably relied on FRDS to ensure WISHA compliance, where SFC Homes had no knowledge of the framing work or control over the work for which FRDS was hired. Indeed, Garcia-Titla makes no allegation that SFC Homes was in charge of how the work was performed. Washington's long-standing law is clear: because SFC Homes had no knowledge of framing work, no right to control the work FRDS was entrusted to perform, and did not exercise any such control, the statutory duty applied to general contractors does not apply under the undisputed facts of this case.

Finally, Garcia-Titla repeatedly makes the erroneous argument that as an owner/developer, SFC Homes was per se liable for compliance with WISHA regulations if it did not hire a general contractor. See Br. of Appellant at 9. Garcia-Titla cites *Stute*, *Moen v. Island Steel Erectors*, 128

Wn.2d 745, 912 P.2d 472 (1996), and *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978). Nothing in these cases says this. Again, Garcia-Titla misinterprets well-established Washington law. *Stute*, *Moen*, and *Kelley* all involved the duties of general contractors, not jobsite owners, to the employees of subcontractors. This court should reject Garcia-Titla's arguments in this regard.

2. SFC Homes Had No *Stute* Duty because Garcia-Titla Did not Establish SFC Homes Was the General Contractor

Garcia-Titla also attempts to argue, contrary to the undisputed evidence on summary judgment, that SFC Homes was the general contractor for the project in question, and therefore it was per se liable for Garcia-Titla's injuries under *Stute*. Br. of Appellant at 17-22. In support of this contention, Garcia-Titla primarily relies upon documents obtained as public records from the City of Gig Harbor that he filed in support of his motion for reconsideration.[6] Those records were not before the trial court on summary judgment and they are therefore not properly before this court when ruling on that motion.[7]

When considering only the evidence before this court on summary judgment, that evidence is clearly insufficient to establish that SFC Homes

[6] Those citations include CP at 198-203, 427, and 432.
[7] The documents were also not properly before the court on reconsideration, see Section E, infra.

was the general contractor. The Assessor-Treasurer's document upon which Garcia-Titla relies simply states that SFC Homes, LLC, was the grantor of property on August 23, 2011, thereby indicating that SFC Homes was the owner of the property in question. CP at 125. That document says nothing about general contractors or the general contractor on the project site. Garcia-Titla also cites licensing information for SFC Homes obtained from L&I's website, which states that SFC Homes has a construction contractor's license. CP at 130, 132-33. However, those documents make no representations regarding the project site in question. In addition, Garcia-Titla cites information obtained from the Washington Secretary of State's website, providing that SFC Homes is an active corporation managed by Atsushi Iwasaki. CP at 135-36. Those documents say nothing about either SFC Homes's contractor status or the jobsite in question. Finally, Garcia-Titla cites a document obtained from the Washington Department of Revenue's website stating that SFC Homes was engaged in "new single-family housing construction" and a printout from Sumitomo Forestry Group's website stating that SFC Homes engaged in the business of "[c]onstruction and subdivision sales of detached houses." CP at 138, 144. Documentation that SFC Homes was in the business of construction does not create an issue of material fact as to whether it was the general contractor for the project in question on the

jobsite in question. Because Garcia-Titla failed to bring forth any competent evidence on summary judgment establishing a genuine issue of material fact on whether SFC Homes was a general contractor, the trial court properly granted SFC Homes's motion for summary judgment on Garcia-Titla's *Stute* claims.

3. *Stute* Does Not Apply in the Absence of WISHA Violations or Specific Allegations Thereof

The duty to ensure compliance with WISHA regulations on a jobsite can only be imposed where a plaintiff "asserts that the employer did not follow *particular* WISHA regulations." *Stute*, 114 Wn.2d at 457 (emphasis added). Here, Garcia-Titla wholly failed to present evidence of the violation of specific WISHA regulations. In his response to SFC Homes's summary judgment motion, Garcia-Titla alleged simply that "Defendants violated the WAC and are responsible for Plaintiff's injuries." CP at 118. Further, L&I investigated the incident, and no WISHA violations were found. CP at 101-02.

Moreover, at summary judgment, SFC Homes introduced testimony from its safety expert, Kurt Stranne, who stated that WISHA does not require fall protection for framers at heights of under ten feet.[8]

[8] WAC 296-155-24510 (the provision applicable in 2011) provides: "When employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed, and implemented." CP 489.

CP at 489-90. SFC Homes brought forth testimony establishing the absence of an issue of fact on WISHA violations, and it was Garcia-Titla's burden to respond with specific facts showing the existence of an issue of fact on whether WISHA violations occurred. See *Right-Price Recreation*, 146 Wn.2d at 382. Garcia-Titla failed to do so.

The trial court recognized this failure at oral argument, stating:

> Well, but even a general contractor is not a strict liability standard. You still have to show a [WISHA] violation. So where do you have that? I mean, all that does—if they are a general, it just means that they can't shift the responsibility for general safety compliance on-site, but you've got to show that there was a violation and that that was a cause of his injury, and I don't have that either.

CP at 293. In response, Garcia-Titla acknowledged the fact that he had not alleged any WISHA violations, stating, "the reason that you don't have that is because the violations that we are going to be presenting to the jury, if allowed to do so, are the same ones that I usually bring in a summary judgment—partial summary judgment motion on the issue of WAC violations." CP at 293-94. Garcia-Titla's acknowledgement of the absence of any evidence of WISHA violations in his response to SFC Homes' summary judgment motion is fatal to Garcia-Titla's case.[9]

[9] Regardless of any WISHA provisions cited on reconsideration or on appeal, this court is limited to reviewing the materials presented to the trial court on summary judgment. See *Lakey*, 176 Wn.2d at 922. Accordingly, any ex post facto allegations of WISHA violations, apart from those made on a proper ground on reconsideration (which did not

4. Garcia-Titla Has Failed To Establish Causation

Finally, even if Garcia-Titla could prove that (1) SFC Homes was the general contractor and (2) specific WISHA violations occurred, he must nevertheless prove the remaining elements of a negligence claim against SFC Homes: that the alleged WISHA violations caused Garcia-Titla's damages.

Garcia-Titla did not present evidence in response to SFC Homes's summary judgment motion that any WISHA violation was the proximate cause of Garcia-Titla's injuries. Rather, Garcia-Titla states that "[a]ll [he] had to prove was that (1) he was working at the job site[,] (2) no one from SFC Homes ever came around to supervise the safety aspect of the job[,] and (3) he suffered injury after a faulty piece of lumber broke under his feet." Br. of Appellant at 12. He further states that "[c]ausation is left to the trier of fact; but duty exists." *Id.*

In making these arguments, Garcia-Titla effectively argues for strict liability for WISHA violations on a jobsite. This is not the law. Although *Stute* established that a general contractor has a duty to its subcontractors' employees as a matter of law, the Court did *not* create a strict liability claim against general contractors premised only upon a WISHA violation. See *Doss*, 60 Wn. App. at 129-30 (recognizing that a WISHA

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occur in the present case) must be disregarded for the purposes of evaluating the trial court's decision on summary judgment.

violation under *Stute* is evidence of breach but not negligence per se). Rather, even if a plaintiff can show a WISHA violation, the plaintiff must also establish that (1) the violation resulted from the general contractor's failure to exercise reasonable care[10] and (2) the violation was the proximate cause of the accident.[11]

Thus, even if Garcia-Titla had alleged the existence of specific WISHA violations (which he did not), he was still required to bring forth evidence establishing that any claimed violation caused his injuries, an element of negligence upon which he bore the burden of proof at trial. See *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 698, 324 P.3d 743 (2014) (To avoid summary judgment dismissal in a negligence case, "the plaintiff must show a genuine issue of material fact on each element of negligence – duty, breach, causation and damage."). Garcia-Titla's failure to bring forth any evidence establishing causation is fatal to his claim that SFC Homes negligently caused his injuries.

D. No Common Law Duty as Landowner

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[10] See *Degroot v. Berkley Constr., Inc.*, 83 Wn. App. 125, 131, 920 P.2d 619 (1996) (approving jury instruction stating that "general contractors must exercise ordinary care to provide for compliance with safety regulations on the job site").

[11] *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 783-84, 133 P.3d 944 (2006) ("*Stute* did not hold that a general contractor is liable for injuries to the employee of a subcontractor regardless whether the general contractor's failure to comply with safety regulations caused the accident.").

At summary judgment, SFC Homes argued that it owed no duty to Garcia-Titla as a business invitee. CP at 24-27. In response, Garcia-Titla conceded this point.[12] CP at 118. Garcia-Titla's concession is dispositive, and the court should decline to address the issue further.

Moreover, even if this court were to examine whether SFC Homes owed a duty to Garcia-Titla as an invitee on its land, the undisputed facts of this case demonstrate that SFC Homes owed Garcia-Titla no duty. The duty owed by a landowner to a person on their land depends upon the entrant's status as a trespasser, licensee, or invitee. *Kamla*, 147 Wn.2d at 125. Employees of independent contractors hired by landowners are considered invitees on the landowners' premises. *Id.* Washington follows Sections 343 and 343A of the Restatement (Second) of Torts to define a landowner's duty to invitees. *Id.* Section 343 provides:

> 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

[12] Garcia-Titla stated in his response brief: "[T]his case has nothing to do with owners of land and invitees. This analysis is not applicable to the present case. There is no 'alleged condition' in a *State* case. Here, the joist that broke under this unwitting worker's feet was not an 'alleged condition' as that is contemplated in premises liability cases." CP at 118.

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

RESTATEMENT (SECOND) OF TORTS § 343, at 215-16. Section 343A provides: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." RESTATEMENT (SECOND) OF TORTS § 343A at 218. Further, a landowner owes no duty to an employee of an independent contractor "to protect him from the negligence of his own master." *Hymas v. UAP Distribution, Inc.*, 167 Wn. App. 136, 161-62, 272 P.3d 889 (2012).

Here, even assuming that the risk of falling from the first story of the home in this case was a known, obvious condition under the Restatement, SFC Homes owed no duty to protect Garcia-Titla against that danger because SFC Homes had no reason to believe that Garcia-Titla would not protect himself against the danger. See *Kamla*, 147 Wn.2d at 126.

In *Kamla*, the Court held that the Space Needle should not have anticipated the risk that Kamla would drag his safety line across the open elevator shaft. 147 Wn.2d at 127. The Court reasoned:

> Pyro was a business entity that represented itself as possessing expertise in the creation and execution of fireworks displays. Collectively, the project team for Pyro had over 100 years of experience in designing, installing, and executing fireworks displays. Pyro created similar displays at the Space Needle the two previous years and suggested to Space Needle that it incorporate the 200-foot level into the 1997 New Year's Eve display. Kamla worked for Pyro in the core of the Space Needle the two previous years. Pyro employees who worked in the core were exposed to and aware of the danger posed by the moving elevators. Finally, Pyro employees had independently devised a safety system designed to avoid the elevator openings.
>
> Given Pyro's expertise, Kamla's two years of personal experience working on the 200-foot level next to the obvious danger posed by the elevators, and Kamla's own acute awareness of the danger posed by the moving elevators, we believe no reasonable trier of fact could find Space Needle should have anticipated that Kamla would drag his safety line across the open elevator shaft.

Id. at 126-27.

Here, as in *Kamla*, FRDS was a business entity that held itself out as an expert in framing, and it were hired to perform work on the subject project based upon that expertise. CP at 106. Garcia-Titla himself was also an experienced framer, and had worked on framing projects for FRDS on two previous occasions. CP at 57, 84, 92-94. Garcia-Titla admitted in his deposition that he was aware of the dangers associated with performing framing work and that he was knowledgeable regarding the available safety precautions used in the framing industry to prevent falls.

CP at 74-78. Given FRDS's expertise, Garcia-Titla's experience with framing work, and Garcia-Titla's personal knowledge of the dangers associated with framing and the safety precautions available, no reasonable trier of fact could find that SFC Homes should have anticipated that Garcia-Titla would have inadequately protected himself against the fall that occurred in the present case. See *Kamla*, 147 Wn.2d at 126-27. Accordingly, as a matter of law, SFC Homes owed no duty to Garcia-Titla as a landowner to an invitee.

E. The Trial Court Properly Denied Garcia-Titla's Motion for Reconsideration

Garcia-Titla moved for reconsideration, claiming that he misunderstood the issues at summary judgment. He claimed that he was under the mistaken belief that the issue before the court was not whether SFC Homes was the general contractor for the project at issue, but, rather, whether SFC Homes was simply "a" general contractor. CP at 178-79. He therefore claimed that he was entitled to submit additional evidence showing that SFC Homes was "the" general contractor in the present case, under CR 59(a)(4). CP at 178-79. The trial court rejected this argument and should be affirmed.

Garcia-Titla's apparent purpose in moving for reconsideration was to introduce records not previously submitted, which were readily

available to Garcia-Titla prior to the summary judgment, and the trial court properly declined to consider it on reconsideration. Garcia-Titla also claimed "surprise" under CR 59(a)(3) because counsel for SFC Homes mentioned at oral argument the existence of a contract involving a different entity who was the general contractor. Because Garcia-Titla now claims that the contract has no bearing on this case, it cannot be material to his case and therefore Garcia-Titla has waived this ground for reconsideration. Garcia-Titla also sought reconsideration under CR 59(a)(7), claiming that the trial court misapplied *Stute* and *Kamla* because the trial court improperly found that SFC Homes was not the general contractor. However, where the evidence before the trial court at summary judgment demonstrated that SFC Homes was the owner, not the general contractor, Garcia-Titla's claim for reconsideration of this issue was properly denied.

Finally, Garcia-Titla argued that substantial justice was not done under CR 59(a)(9) because a jury should be permitted to decide the issue of whether WISHA violations occurred. But Garcia-Titla was required to present *some* evidence creating an issue of material fact as to the existence of WISHA violations in response to the summary judgment and failed to do so. As the trial court pointed out in colloquy with Garcia-Titla's counsel during the hearing on the motion for reconsideration: "[T]he

other part that was missing at summary judgment was anything showing there was a safety violation." CP 464. Therefore, his request that a jury hear his arguments on WISHA violations in the absence of any evidence was properly denied.

Garcia-Titla did not even try to argue any basis for submitting deposition testimony of his expert on the motion for reconsideration, which he had not submitted in response to the summary judgment motion. Clearly he could have submitted his expert's declaration in response to the summary judgment. He did not, and did not create a material issue of fact on the issue whether any WISHA violation occurred or caused his damages.

1. Garcia-Titla's "Misunderstanding" of the Issues Was Not Grounds for Reconsideration

Garcia-Titla moved for reconsideration on multiple grounds. However, many of his claims were premised on his assertion that SFC Homes "changed" the issue on reply from whether SFC Homes was "a" general contractor to whether it was "the" general contractor on the project in question. Garcia-Titla thus claimed that he was unable to properly address the issue of whether SFC Homes was "the" general contractor on summary judgment, and instead only presented evidence that SFC Homes was "a" general contractor. See CP at 175-76, 178-79, 184-87.

But SFC Homes clearly framed the issue in its opening brief, moving the trial court for summary judgment dismissal of Garcia-Titla's claims "because the indisputable facts show there is no genuine issue of material fact for trial, where SFC Homes: (1) was the owner and not general contractor *of the subject property*." CP at 10 (emphasis added). It is inconceivable that Garcia-Titla could have interpreted SFC Homes's argument as anything other than a claim that it was not the general contractor *for the purposes of the construction project on which Garcia-Titla was injured.* [13,14]

Garcia-Titla's claimed misunderstanding of the issue before the trial court on summary judgment appears to be an attempt to introduce evidence he could have but did not submit earlier. In response to SFC Homes's motion, Garcia-Titla submitted no evidence that SFC Homes was

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[13] Garcia Titla's misunderstanding is perhaps a misconstruction of the applicable case law. The rationale behind *Stute* is to impose liability on those entities that act in a supervisory capacity over a jobsite, usually the general contractor, as those entities are "in the best position to ensure compliance with safety regulations." 114 Wn.2d at 463. Thus, the general contractor *for a particular jobsite* will have the innate supervisory authority contemplated by *Stute*. Were Garcia-Titla's purported understanding to be adopted, per se liability could be imposed on entities that have no involvement in a construction project, merely because those entities possessed a general contractor's license. This is not the rule set forth in *Stute*, and no good faith interpretation of *Stute* or its progeny exists that would support Garcia-Titla's position that all a *Stute* plaintiff need prove is the fact that the owner of a jobsite also possesses a contractor's license, regardless of whether that entity was acting as the general contractor for the project in question.

[14] Garcia-Titla was also on notice the fact that SFC Homes was claiming that it was not "the" general contractor for the project in question by asking in discovery to "state each and every fact upon which you rely to support their claim that SFC Homes, LLC was a general contractor *for purposes of the subject project*." CP at 95 (emphasis added).

acting as the general contractor on the project at issue in this case,[15] or as an owner that retained control under *Kamla*. While SFC Homes identified this absence of evidence in its reply brief, it certainly did not recharacterize the issue before the trial court on summary judgment.

Garcia-Titla's claimed misunderstanding in these circumstances is not a valid ground for reconsideration under any portion of CR 59(a). This court should affirm the trial court's denial of Garcia-Titla's motion for reconsideration on this ground.

2. City Records Are Not Newly Discovered Evidence under CR 59(a)(4)

On reconsideration, Garcia-Titla submitted documents obtained from the City of Gig Harbor which, he claimed, demonstrated that SFC Homes was the general contractor for the project in question and which constituted "newly discovered evidence" under CR 59(a)(4). Garcia-Titla argues on appeal that the trial court abused its discretion in declining to consider the late-submitted public records and denying reconsideration on this ground. Br. of Appellant at 25-26. This court should disagree.

Garcia-Titla asserted that the records were "newly discovered" and therefore admissible under CR 59(a)(4), which permits a trial court to grant reconsideration upon the presentation of "[n]ewly discovered

[15] The trial court acknowledged this absence of evidence at oral argument, stating that the materials submitted by Garcia-Titla did not "show that they are a general serving in that capacity on this project." CP at 247.

evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." CR 59(a)(4). A party moving for reconsideration under CR 59(a)(4) must establish that the evidence: "'(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.'" *Holaday v. Merceri*, 49 Wn. App. 321, 329-30, 742 P.2d 127 (1987) (quoting *State v. Evans*, 45 Wn. App. 611, 613, 726 P.2d 1009 (1986)).

The rule does not permit the moving party to re-litigate the issues below by putting forth different evidence. Rather, courts have recognized that "[b]oth a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence." *Wagner Dev. v. Fid. & Deposit*, 95 Wn. App. 896, 907, 977 P.2d 639, 645 (1999).

Here, Garcia-Titla claimed that he could not with "reasonable diligence" have discovered the Gig Harbor records because of his misinterpretation of the issues in SFC Homes's summary judgment motion and the well-established Washington law set forth above. However, the fact that Garcia-Titla may have misunderstood the briefing or the law has

no bearing on whether he exercised "reasonable diligence" in obtaining material evidence necessary to create an issue of fact on summary judgment.

Garcia-Titla's mistaken understanding of the facts that he was required to prove at trial has no bearing on whether he could have accessed the information he now seeks to submit, which is the relevant analysis under CR 59(a)(4). The Gig Harbor records submitted by Garcia-Titla on reconsideration are public records dating back to 2011. It is therefore indisputable that Garcia-Titla could have accessed the records prior to responding to SFC Homes's summary judgment motion. The requirements of CR 59(a)(4) are thus clearly not established, and the evidence was properly disregarded by the trial court.

Further, even if these records were to have been considered by the trial court at summary judgment, these records would have been insufficient to create an issue of material fact as to whether SFC Homes was the general contractor on the jobsite or whether it exercised control over the jobsite.[16] This documents demonstrate no facts additional to those that were presented by Garcia-Titla on summary judgment: that SFC Homes possessed a state contractor's license. The fact that SFC Homes obtained a construction permit does not create an issue of material fact as

[16] The trial court requested supplemental briefing on this issue. See CP at 367.

to its control over the jobsite in light of the undisputed evidence at summary judgment that (1) SFC Homes did not serve as the general contractor for the project and (2) SFC Homes did not retain the right to control the work being performed on the subject property. It also has no bearing on the uncontroverted evidence that no safety or health WISHA violations were found, which renders the imposition of liability under *Stute* unavailable.

3. Garcia-Titla's Concession Waives Claim for Reconsideration under CR 59(a)(3)

Garcia-Titla also argued that the court should reconsider its ruling in light of SFC Homes's statement during oral argument that it possessed a contract between another entity, Henley USA, and FRDS, showing that Henley, not SFC Homes, was the general contractor for the project. CP at 179-80. Garcia-Titla claimed that this statement "surprised" him, justifying relief under CR 59(a)(3), which permits a court to grant reconsideration for "[a]ccident or surprise which ordinary prudence could not have guarded against." CP at 179-81.

After receiving briefing by both parties on the matter disputing whether the existence of a contract that Garcia-Titla could have obtained in discovery, had he issued any requests, constituted "surprise" under CR 59(a)(3), the trial court requested that SFC Homes submit the disputed

contract to the court for review. CP at 376-77. Upon reviewing the contract, Garcia-Titla claimed that it was not valid because it was unsigned and that there was no evidence that it pertained to the project in question. See CP at 410 ("There is no link at all from this document to our case."). Garcia-Titla maintains this position on appeal. Br. of Appellant at 28-29.

Because Garcia-Titla claims that the contract has no bearing on this case, any purported "surprise" regarding its existence cannot be grounds for reconsideration under CR 59(a)(3), where CR 59(a) requires that the "surprise" also "materially affect the substantial rights of [the] parties." If, as Garcia-Titla claims, the contract is not relevant to the case at hand, then it cannot possibly affect his material rights for the purposes of the trial court's decision on summary judgment.

Although counsel for SFC Homes mentioned the existence of the contract at oral argument, SFC Homes did not submit the contract in support of its summary judgment motion because that contract was unnecessary to defeat Garcia-Titla's negligence claims on summary judgment.[17] As discussed above, Garcia-Titla wholly failed to present any

[17] As indicated, the evidence submitted by plaintiff on reconsideration should not be considered. The trial court requested that SFC Homes submit the contract between Henley LLC, the named general contractor, and FRDS. CP 380-405. Garcia-Titla refers to this document in its brief on appeal as the "Master Subcontract" and argues it does not control the relationship of parties at the jobsite. Brief of Appellant, pp. 26-31.

evidence creating an issue of material fact as to SFC Homes's general contractor status. SFC Homes asserted at summary judgment that it was not the project's general contractor. It was Garcia-Titla's burden to rebut that evidence with specific facts sufficient to raise a genuine issue of material fact for trial. See *Rathvon*, 30 Wn. App. at 201. Garcia-Titla failed to do so on summary judgment, and again failed on reconsideration, instead relying only on "evidence" that could have been discovered through ordinary prudence. This court should therefore affirm the trial court's denial of Garcia-Titla's motion for reconsideration.

4. No Relief under CR 59(a)(7) because the Court Properly Applied *Kamla* and *Stute* to the Facts of this Case

Garcia-Titla also argued that the trial court erred in granting SFC Homes's summary judgment motion because the trial court's ruling was improperly premised on the assumptions that (1) SFC Homes was the owner of the subject property and (2) SFC Homes was not the general contractor of the subject property. Garcia-Titla claims that the 2011 City of Gig Harbor documents affirmatively prove that SFC Homes was the general contractor, and that SFC Homes was not the landowner because the documents list another entity, Bennett-SFS LLC, as the "owner." CP at 183.

"On a motion for reconsideration based on CR 59(a)(5)-(9), the court must base its decision on the evidence it already heard at trial." *Holaday*, 49

Wn. App. at 330. Because the entirety of Garcia-Titla's argument under CR 59(a)(7) was premised on information that was not before the trial court on summary judgment, his claims under this rule were properly disregarded by the trial court.

The evidence before the court on summary judgment established that SFC Homes was the owner of the project in question. Garcia-Titla presented no evidence to refute this fact, and presented no evidence establishing that SFC Homes was the general contractor. The trial court applied *Stute* and *Kamla* based on these facts. It was not SFC Homes's burden to prove Garcia-Titla's case, and once SFC Homes established the absence of an issue of material fact on issues upon which Garcia-Titla bore the burden of proof, the burden was on Garcia-Titla to bring forth evidence establishing the absence of an issue of fact. *Rathvon*, 30 Wn. App. at 201. Where Garcia-Titla failed to do so, the court was required to grant SFC Homes's motion. See CR 56(c); *Right-Price Recreation, LLC*, 146 Wn.2d at 382. Because Garcia-Titla's only claim that the trial court erred in its application of the law is premised on facts not before the court on summary judgment, this court should affirm the denial of his request for reconsideration under CR 59(a)(7).

5. Garcia-Titla's Failure To Present Evidence of Control or WISHA Violations Is Not Grounds for Reconsideration under CR 59(a)(9)

Finally, Garcia-Titla argued that "substantial justice" was not done in this case, and that relief was therefore warranted under CR 59(a)(9) because a jury should be permitted to decide the existence of WISHA violations and whether SFC Homes retained control over the jobsite. CP at 187-92. "Granting a new trial for lack of substantial justice, CR 59(a)(9), should be rare, given the other broad grounds available under CR 59." *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467, 476 (2001). Garcia-Titla's attempt to remedy his failure to create an issue of fact on summary judgment is an impermissible ground for reconsideration under the narrow scope of CR 59(a)(9), as well as CR 59 as a whole. See *Green*, 149 Wn. App. at 638.[18]

Garcia-Titla untimely submitted deposition testimony of his safety expert, Mike Sotelo, in support of his assertion that an issue of fact exists on his WISHA violation claims and the issue of control. For the purposes of CR 59(a)(9), Mr. Sotelo's testimony was not before the Court on summary judgment, and therefore cannot be considered. See *Holaday*, 49 Wn. App. at 330. Garcia-Titla argued that various WISHA regulations *could* have been violated and that SFC Homes had control over the jobsite, stating that "[t]hese are all issues for the trier of fact to consider." CP at 188-92. However, regardless of whether these issues are ultimately for the trier of

[18] Also, the case was set for a bench trial, so the trial judge was the trier of fact.

fact to decide, Garcia-Titla was required to bring forth *evidence* in response to the summary judgment that a WISHA violation took place and was causally related to the alleged incident, and that SFC Homes was either the general contractor or exercised control over the work. Garcia-Titla failed to do so in response to the summary judgment motion, and the trial court's inquiry was at an end. Reconsideration is not a remedy for such an evidentiary failure. See *Green v. Hooper*, 149 Wn. App. 627, 205 P.3d 134 (2009) ("[A] CR 59 motion provides a method to seek a new trial; it cannot itself be a new trial.").

Tellingly, Garcia-Titla did not claim that Mr. Sotelo's testimony was "newly discovered evidence," because clearly, it was not. He claimed that the evidence was not available until February 2, 2015, the date of Mr. Sotelo's deposition. That is completely untrue. Garcia-Titla could have submitted a declaration from Mr. Sotelo- his own expert- in response to SFC Homes' motion for summary judgment, but for reasons unbeknownst to SFC Homes, failed to do so. There was no reasonable justification for failing to present his readily available expert testimony at summary judgment. Instead, Garcia-Titla left SFC Homes's expert testimony that there was no WISHA violation, submitted in a declaration from Kurt Stranne, unopposed. See CP at 488-90. Further, if Garcia-Titla believed that additional evidence would be forthcoming that would bear on his response to SFC Homes's

motion, Garcia-Titla could have opposed SFC Homes's motion on that ground and obtained a continuance, but he did not do so. See CR 56(f).

Because Garcia-Titla presented no reason supported by CR 59(a) that would justify reconsideration and no justification for the submission of evidence that was in Garcia-Titla's possession at the time of summary judgment, the trial court did not abuse its discretion in denying Garcia-Titla's motion for reconsideration on this ground.[19]

6. Documents Submitted In Response to SFC Homes's Supplemental Briefing on Reconsideration Are Inadmissible for Any Purpose

In response to SFC Homes's supplemental briefing requested by the trial court on reconsideration, Garcia-Titla submitted extensive documentation to the court that was not before it on summary judgment, including a declaration by Mike Sotelo and additional documentation obtained from the City of Gig Harbor. For a second time, Garcia-Titla attempted to remedy his failure to present readily available evidence at summary judgment. As set forth above, Garcia-Titla was not entitled to submit any additional evidence under any of the CR 59(a) provisions on which he moved for reconsideration, and he was certainly not entitled to again submit additional information not requested by the court in response to

[19] Garcia-Titla also argued that reversal was required under CR 60(b)(1), (3), (4), and (11). However, other than citation to those rules in his statement of relief requested, Garcia-Titla's briefing did not contain any argument pertaining to CR 60. Accordingly, those claims were waived and the trial court properly declined to address them.

SFC Homes's supplemental briefing. Therefore, the materials submitted in conjunction with his motion for reconsideration should not be considered by this court in ruling on the trial court's orders in this case.

VI. CONCLUSION

For the foregoing reasons, SFC Homes respectfully requests that this court affirm the trial court's summary judgment dismissal of Garcia-Titla's claims against SFC Homes and affirm the trial court's denial of Garcia-Titla's motion for reconsideration of the same.

RESPECTFULLY SUBMITTED this 21st day of August, 2015.

ANDREWS ▪ SKINNER, P.S.

By _____

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DECLARATION OF SERVICE

I, Sally Gannett, hereby declare as follows:

1. I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the 21st day of August, 2015, I caused a copy of the foregoing Brief of Respondent to be sent for service upon the following in the manner indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of August, 2015, at Seattle, Washington.

Sally Gannett, Legal Assistant