

64421-1

64421-1

No. 64421-1-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

DALE AND ROBIN NELSON husband and wife and the
marital community comprised thereof,

Appellants,

v.

G. WOLF ENTERPRISES, INC., A WASHINGTON
CORPORATION d/b/a WOLF PACK, and GEORGE O. WOLF
and JANE DOE WOLF, husband and wife and the
marital community comprised thereof,

Respondents.

BRIEF OF APPELLANTS

Brian K. Leonard, P.S.

By: Brian K. Leonard
Attorney for Appellants

100 2nd Avenue, S., Suite 200
Edmonds, WA 98020
(425) 778-1838
WSBA No. 18087

2010 MAR 21 11:01
COURT OF APPEALS
DIVISION 1
CLERK OF COURT

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR....1

III. Statement of the Case 1-6

IV. Argument 6-18

V. Conclusion 18-19

TABLE OF AUTHORITIES

Cases

<i>Coleman v. Hoffman</i> , 115 Wash. App. 853, 64 P.3d 65 (2003)	10
<i>Doss v. ITT Rayonier, Inc.</i> , 60 Wn.App. 125, 803 P.2d 4 (1991)	12
<i>Degel v. Majestic Mobile Manor, Inc.</i> , 129 Wash. 2d 43, 49, 914 P.2d 728 (1996)	7
<i>Frank D. Black, Inc., v. Crescent Mfg. Co.</i> , 146 Wash. 119, 262 P. 125 (1927)	10
<i>Geise v. Lee</i> , 84 Wash. 2d 866, 529 P.2d 1054 (1975)	10
<i>Hardman Estate v. McNair</i> , 61 Wash. 74, 111 P. 1059 (1910)	9
<i>Hollingbery v. Dunn</i> , 68 Wash.2d 75, 79, ___ P.2d ___ (1966)	14
<i>Iwai v. State</i> , 129 Wash.2d 84, 95-96, 915 P.2d 1089 (1996)	16
<i>Kenneth v. Yates</i> , 41 Wash. 2d 558, 250 P.2d 962 (1952)	10
<i>Kinney v. Space Needle Corp.</i> , 121 Wn. App. 242, 85 P.3d 918 (2004)	12,13, 14, 15
<i>McKinnon v. Washington Fed. Sav. & Loan Ass'n</i> , 68 Wn.2d 644, 650, 414 P.2d 773 (1966)	6
<i>Musci v. Graoch Ass's., Let. Prtshp.</i> , 144 Wash. 2d 847, 31 P.3d 684 (2001)	10
<i>Olympic Fish Products, Inc. v. Lloyd</i> , 93 Wn.2d 596, 562, 611 P.2d 737 (1980).	16
<i>Shingledecker v. Roofmaster Products Co.</i> , 93 Wn. App. 867, 971 P.2d 523, review denied 138 Wash.2d 1018, 989 P.2d 1141 (1999)	13, 15, 16

<i>Sjogren v. Props. of the Pac. N.W., L.L.C.</i> , 118 Wn. App. 144, 148 (2003)	7
<i>Stute v. P.B.M.C.</i> , 114 wash.2d 454, 464, 788 P.2d 545 (1990)	13
<i>Tincani v. Inland Empire Zoological Soc'y</i> , 124 Wash. 2d 121,139, 875 P.2d 621 (1994)	7
<i>Van Dinter v. City of Kennewick</i> , 121 Wash.2d 38, 44, 846 P.2d 552 (1993)	17
<i>Ward v. Thomson</i> ,57 Wn.2d 655, 359 P.2d 143 (1961)	7
<i>Weinert v. Bronco Nat'l Co.</i> , 58 Wn.App. 692, 696, 795 P.2d 1167 (1990)	10
<i>Younce v. Ferguson</i> , 106 Wn.2d 658, 667, 724 P.2d 991 (1986)	6
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wash.2d 216, 225, 770 P.2d 182 (1989)	16
<u>Statutes</u>	
RCW 49.17.060(2)	12
RCW 49.17.010	13
RCW 49.17.040	13
RCW 49.17.050	13
WAC 296.800.29015	5

I. ASSIGNMENTS OF ERROR

1. Did the trial court err in entering Summary Judgment against Plaintiff on his common law premises liability claim?

2. Did the trial court err in entering Summary Judgment against Plaintiff on his Statutory WISHA violation claim?

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Dale Nelson have “invitee” status on the Wolf property, including in the storage loft where Nelson kept his products and supplies?

2. Was the danger of the ladder open and obvious?

3. Did Wolf assert such control over the premise so as to extend WISHA coverage to Dale Nelson?

III. STATEMENT OF THE CASE

On July 14, 2009, the trial court denied Defendants’ Motion for Summary Judgment on Plaintiffs’ common law liability claims and granted Summary Judgment on the statutory workplace safety claim. On August 19, 2009, after reviewing Defendants Motion for Reconsideration and Plaintiffs’ Response the court requested additional briefing on three

cases dealing with the disparate duty owed to an “invitee” versus a “licensee” in a premises liability case. After receiving this additional briefing on the “invitee” versus “licensee” issue the court reversed itself and granted Defendants Motion For Summary Judgment on the common law premises negligence claim.

Plaintiff Dale Nelson rented space in a warehouse and food processing plant owned by Defendant George Wolf and operated as Wolf Enterprise, Inc., d/b/a/ Wolf Pack (*See CP 96, Declaration of Dale Nelson* § 4, attached to plaintiffs Response To Motion For Summary Judgment as Exhibit 1, CP 117, *Nelson Deposition* § 60, attached to defendants Motion for Summary Judgment Exhibit 1.) The verbal rental agreement included office space at Wolf’s facility, and also use of storage space on a mezzanine level for Nelson to keep his ingredients, products and shipping supplies. Under the agreement Nelson would also have access to the production facilities and the entire warehouse at any time without restriction. The parties intended that the rental agreement would enable Nelson to process food, such as jams and salsa, and engage in related packaging, storage, marketing, and shipping of those food products. (CP 94, *Nelson Decl.* § 4-6). There were no restrictions, express or implied, on Nelson’s access or use of the facility. Nelson used his office space, the

storage mezzanine and the entire facility without restriction for over two years before the accident that gave rise to this lawsuit.

Though Nelson was generally only at the warehouse one or two days a week (CP 95, *Nelson Decl.* § 3) he had previously personally gone up into the mezzanine storage area at least once before (CP 115, *Nelson Deposition* § 41, attached to defendants Motion for Summary Judgment Exhibit 1.) There was no restriction regarding Nelson's access to the mezzanine storage area expressed or implied in the verbal rental contract or in the parties' course of dealing. But it was more common that Wolf Pack employees would unload Nelson's delivered supplies and put them in the mezzanine storage above Nelson's office. Wolf Pack had several employees who were typically at the facility when supplies were delivered. (CP 95-96, *Nelson Decl.* § 10, 11, *CP 115, Nelson Deposition* § 40, attached to defendants Motion for Summary Judgment Exhibit 1.) Nelson assisted Wolf Pack employees to store supplies on the mezzanine using the Wolf Pack ladder for access. (*CP 96, Declaration of Dale Nelson* § 4)

On August 17, 2005, Nelson accessed the mezzanine above his office to retrieve packing materials, using the extension ladder provided by Wolf at the site. (See *CP 96, Nelson Decl.* §13.) This ladder was the only means of access to the storage mezzanine area. Nelson was unaware

of any particular safety features that ladders should have at the top or bottom of the ladder or particular techniques that might be required to set up the ladder. After getting up to the storage and tossing down supplies he needed, Nelson stepped on the ladder to descend. The ladder kicked out and he suddenly fell to the floor. With no railing or other protective structure, there was nothing to grab onto to break his fall except dangling electrical wires. When he struck the concrete floor he shattered his elbow and broke his leg. (See CP 97, *Nelson Decl.* §16.).

As is often the case in smaller scale rural production facilities Dale Nelson wore several hats at the Wolf Pack facility. He was more than a tenant and Wolf was more than a landlord. For several months before moving his business to the warehouse and afterwards, Nelson (at all times an employee for Food Concepts, Inc.) was Wolf's customer - paying Wolf Pack fees for food production. For his own customers Wolf referred to Nelson. On behalf of Food Concepts, Inc. Nelson also provided independent consultation regarding formulations and monitored food production for quality control. Wolf's customers paid Food Concepts, Inc. directly for the consultation services. Nelson's independent consultation for Wolf's food production business advised customers and Wolf himself in matters that assisted Wolf to do food production. (CP 94-95, *Nelson Decl.* § 5-7.) Wolf had occasions to request Nelson to do sampling for

quality control.

Though Nelson was generally only at the warehouse one or two days a week, when he was there Wolf sometimes asked him to perform tasks for Wolf's operations, which he did. These included product packing and shipping assistance and operating Wolf's forklift to help unload Wolf's food items from delivery trucks. Wolf paid Nelson for such services. (CP 95, *Nelson Decl.* § 8.)

The parties' rental arrangement was verbal (CP 95, *Nelson Decl.* § 9.) The indoor warehouse storage use and location was determined and directed entirely by Wolf. He directed his employees to store supplies – his and Nelson's -- in the roof rafters and the mezzanine above Nelson's office. These areas were at least ten feet off the ground with no stair access.

Wolf controlled the access to the storage areas. The actual moving of Food Concept's, Wolf's or others' items from delivery trucks to the roof storage areas and warehouse space was typically done by Wolf's employees. His employees lifted and carried Food Concept, Inc.'s storage materials and supplies up an extension ladder into the storage area because there were no stairs. The ladder had no regulation cleats or safety feet, cleats that attached to the floor or anything that secured it at the top as

WISHA regulations required.¹ (CP 104-105, *Larson Declaration*) Wolf further directed his employees to bring down items from storage when they were needed for Nelson, Wolf or others. Wolf charged labor costs for Wolf's employees to perform the storage work and clean Nelson's office. (CP 96, *Nelson Decl. §12.*)

LEGAL ARGUMENT

A. Nelson Was an "Invitee" For The Purpose of Premises Liability

Dale Nelson was an "invitee" on the Wolf Pack premises, including on the mezzanine and access area. He paid rent for an office and for use of the rest of the facility. His entry onto the premise was for Wolf Pack's direct economic benefit. Washington has adopted the **definition** of 'invitee' set forth in the Restatement (Second) of Torts sec.332. Under that **definition**, an 'invitee' is either a public invitee or a business visitor: *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 650, 414 P.2d 773 (1966).

¹ WAC 296-800-29015 pertains to portable ladders: metal and wooden and requires:

- (1) Use metal ladders only for their intended purpose.
- (2) Make sure the base section of the portable metal ladder has secure footing. (It shows "Exam(ples of Securing the Ladder Base" which include "rubber safety feet, spikes and cleats nailed to the floor.)
- (3) Make sure both rails are supported at the top, unless the ladder has a single support attachment (Ladder support attachments at the top that comply are shown in pictures in the WAC.)

'A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.' Restatement (Second) of Torts sec.332(2), (3) *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986).

The ultimate goal is to differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social. *Ward v. Thomson*, 57 Wn.2d 655, 359 P.2d 143 (1961)

The evidence overwhelmingly shows that Dale Nelson was an invitee of Wolf Pack at the warehouse. At the very least there was a fact issue as to Nelson's status. It was error to conclude as a matter of law that Nelson was just a licensee, owed a lower duty by Wolf Pack.

B. Defendants Breached Duties Owed as the Landlord To Protect "Invitee" Nelson Regarding the Unsafe Conditions

A landlord has an affirmative obligation to maintain common areas in a reasonably safe condition for a tenant or her guest. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash. 2d 43, 49, 914 P.2d 728 (1996). Generally, a landlord has no duty to protect a tenant or guest from dangers that are open and obvious. *See Sjogren v. Props. of the Pac. N.W., L.L.C.*, 118 Wn. App. 144, 148 (2003). In limited circumstances, however, RESTATEMENT (SECOND) OF TORTS § 343A creates a duty to

protect tenants and guests even from known or obvious dangers. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash. 2d 121,139, 875 P.2d 621 (1994); RESTATEMENT (SECOND) OF TORTS § 343A (1965). In such cases, a duty arises if the landlord “ ‘should anticipate the harm despite such knowledge or obviousness.’” *Tincani*, 124 Wash.2d at 139 (quoting RESTATEMENT (SECOND) OF TORTS § 343A(1)).

Sjogren held that the trial court erred in finding a darkened stairway an “open and obvious” condition. The plaintiff was unaware that the lights on the stairs were out when she entered the building because it was not yet dark. Once she started down the stairs, she was not aware that the lights were out because the light from her daughter's apartment illuminated the area. The court held that *Sjogren* also presented evidence sufficient to fit within the limited circumstances contemplated by the RESTATEMENT (SECOND) OF TORTS § 343(A). Whether *Sjogren* knowingly exposed herself to the darkened stairway condition was a question of fact.

A reasonable juror could conclude that the landlord had reason to expect that under these circumstances, *Sjogren* would elect the advantages of continuing down the stairs against the apparent risks of doing so. *Tincani*, 124 Wash. Ed at 139. In short, it would be error here, as it was in *Tincani*, to instruct that the landlord never has a duty to warn about open and apparent dangers. And the court's summary judgment in favor of Properties had the same

effect; it was a ruling that Properties had no duty under any circumstances to warn of or correct the obvious danger.

Id. at 149. *See* RESTATEMENT (SECOND) OF TORTS § 343(A) cmt. e (1965) (If a person knows the actual conditions and the dangers involved, the person is free to make an intelligent choice as to whether the advantage gained is sufficient to incur the risk.).

The RESTATEMENT (SECOND) OF TORTS § 343(A) applies to situations where:

(T)he possessor has reason to expect that the invitee's attention may be distracted, so that he [or she] will not discover what is obvious, or will forget what he [or she] has discovered, or fail to protect . . . against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [person] in [that] position the advantages of doing so would outweigh the apparent risk.

The jury could infer that the risks posed by the *nonregulation ladder* were not open and obvious to an untrained worker/tenant, such as Nelson. Alternatively, even if the risks of the ladder were open and obvious, a jury could find that Wolf had reason to expect that Nelson would reasonably encounter the risk posed by the ladder. As landlord Defendants can be liable for open and obvious dangers if they should have anticipated the harm.

It has also long been a rule in Washington that

When a landlord makes improvements or rebuilds existing improvements, for a specific purpose and the lease requires the tenant to use the premises for that purpose, an implied warranty arises that they will be fit for that purpose . . . (and) that it shall be structurally sound.

W. Stoebeck & J. Weaver, 18 Wash. Prac.Series: Real Estate Transactions § 628. *See Hardman Estate v. McNair*, 61 Wash. 74, 111 P. 1059 (1910); *Frank D. Black, Inc., v. Crescent Mfg. Co.*, 146 Wash. 119, 262 P. 125 (1927). The rental space was not fit for the purpose Defendants rented it to Food Concepts.

When injuries occur upon common areas, the landlord is liable for injuries that are caused by the landlord's negligent acts or negligent maintenance of such areas. *See Musci v. Graoch Ass's., Let. Prtshp.*, 144 Wash. 2d 847, 31 P.3d 684 (2001) (landlord must keep all common areas free of ice and snow); *Geise v. Lee*, 84 Wash. 2d 866, 529 P.2d 1054 (1975); *Kenneth v. Yates*, 41 Wash. 2d 558, 250 P.2d 962 (1952). See also, *Coleman v. Hoffman*, 115 Wash. App. 853, 64 P.3d 65 (2003) (negligent maintenance of balcony). The fact that the storage areas were accessed by Defendants' employees, used by the landlord, and subject to the landlord's direction and control should qualify them as "common areas" in the possession of the landlord.

Defendants owed Nelson the landlord's common law duty of care. The ladder was his only access to Food Concept's supplies and storage area. The ladder Defendants furnished did not meet the standards in WAC 296-800-24015 requiring secure footing with safety cleats and protection against slipping. (CP 105, *Larson Declaration*). Nelson did not know what safety features the ladder was supposed to have, nor did he know the specific hazards posed by the ladder. Defendants should have anticipated that Nelson might need access to his company's supplies and have no way to get them except with the ladder Wolf provided to his employees. Wolf should also have anticipated that Nelson would not know that the ladder placed Nelson at great risk. At the very least, Plaintiffs have demonstrated that there are multiple genuine issues of material fact involving the duties as landlord and Nelson's awareness of specific hazards in connection with the ladder .

C. The Defendants Retained Control of the Premise Triggered WISHA Safety Compliance

The facts show Defendants controlled the facility which gave rise to statutory duties owed to Nelson as a matter of law. Nelson on behalf of Food Concepts, Inc. entered a lease agreement with Defendant Wolf to rent property, which Defendants designed and constructed as a workplace for commercial food production, storage, packaging, and shipping. Wolf

knew that Nelson possessed food production consultation experience with specialty foods that Wolf wanted and which could be offered to Wolf's customers. Wolf sought Nelson's on site independent services for Wolf's needs and for Wolf's customers. However, Wolf retained control and direction over the entire premises, the production, delivery area, the roof rafter storage he was renting to Nelson, and other storage for Wolf's own supplies. Wolfe's employees even used Nelson's office telephone. (CP 96, *Nelson Decl.* §12.) Because Wolf retained control created over the premises and storage work, Defendants were responsible for ensuring compliance with WISHA regulations. *See Weinert v. Bronco Nat'l Co.*, 58 Wn.App. 692, 696, 795 P.2d 1167 (1990), review denied (extending liability to an owner/developer in the fall of an employee from scaffolding because the owner's role was so comparable to that of a general contractor). The basis for imposing the duty to enforce WISHA laws on a contractor exist with "respect to an *owner/developer* who like the general contractor has the same innate overall supervisory authority and is in the best position to enforce safety regulations." (Emphasis added.) *Id.* *See also, Doss v. ITT Rayonier, Inc.*, 60 Wn.App. 125, 803 P.2d 4 (1991) (property owner had a duty to both its own employees and employee of an independent contractor on the premises to clean a boiler to comply with WISHA safety regulations).

Wolf's role as both employer with employees² and jobsite owner conducting business on the premises triggered his duty under RCW 49.17.020 and 49.17.060 to comply with all WISHA workplace safety regulations, including for proper stair construction and use of a code complying ladder. This duty ran to all employees on the premises. Defendants' supervisory authority over storage and packing in Food Concept's storage area and throughout the warehouse triggered compliance with specific regulations extending its duty not just to its own employees, but that of Food Concepts, Inc. and Dale Nelson working on the jobsite. Due to Wolf's retained right of control and actual control over the facilities, Defendants owed Nelson, as an employee of an independent contractor, statutory workplace safety duties under WISHA³ and WAC 296-800-11020. *See Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 85

² RCW 49.17.020 (4) and (5) define "employer" and "employee" for purposes of WISHA to include at least 4 or more employees.

³ *See RCW 49.17.010, 49.17.040 and 49.17.050* which authorizes rules, regulations, and guidelines, to include among other standards to (9) Provide for the adoption of safety and health standards requiring the use of safeguards in trenches and excavations and around openings of hoistways, hatchways, elevators, stairways, and similar openings.

WAC 296-800-11020 Construct your workplace so it is safe. You must:

- Not construct, or cause to be constructed, a workplace that is not safe.
- This rule applies to employers, owners, and renters of property used as a place of employment.

P.3d 918 (2004). *See also Shingledecker v. Roofmaster Products Co.*, 93 Wn. App. 867, 971 P.2d 523, review denied 138 Wash.2d 1018, 989 P.2d 1141 (1999) (holding that owner developers with supervisory authority have a duty to protect their own employees and employees of independent contractors from recognized hazards not covered by specific safety regulations).

The Code prohibits constructing a workplace that is not safe and was expressly made applicable to owners and renters of property used as a place of employment. The WISHA regulations also establish a standard of care. Courts have interpreted the workplace safety laws and regulations promulgated thereunder to apply to employers. RCW 49.17.060(2) imposes an expansive nondelegable duty on general contractors to ensure compliance with WISHA regulations based on the contractors “innate supervisory authority” which controls the workplace. *See Stute v. P.B.M.C.*, 114 Wash.2d 454, 464, 788 P.2d 545 (1990). In *Stute*, there was no scaffolding or safety equipment for gutter work where a subcontractor’s employee fell from three stories. The expansive liability was justified because supervisory authority and control of the worksite creates the best position, financially and structurally to ensure WISHA compliance for the safety of all workers. *Id* at 463.

Jobsite owners have also been liable for injuries caused by unsafe, noncomplying conditions when some type of employment relationship or “retained control” over the manner of work is shown. *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 247, 85 P.3d 918 (2004). It is known as the retained control exception to the general rule of nonliability for injuries to employees of independent contractors. Liability is imposed on the owner for injuries of employees of an independent contractor merely from the owner retaining the *right to direct the manner in which work is performed*, not simply *actually* exercising control. Here, it is clear that WISHA created statutory obligations and that the exception applies for breach of WISHA safety standards by Defendants; Wolf *actually exercised the right he retained over the workplace premises, directing storage, production, control over deliveries, and the equipment to be used*.

D. The Facts Demonstrate Nelson Was An Independent Contractor

An independent contractor is generally defined as one who contractually undertakes to perform services for another, but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in performing the services. *Hollingbery v. Dunn*, 68 Wash.2d 75, 79, ___ P.2d ___ (1966); Restatement (Second), Agency § 2(3) (1958).

Whether in a given situation, one is an employee or an independent contractor depends to a large degree upon the facts and circumstances of the transaction and the context in which they must be considered. If the facts are undisputed and but a single conclusion may be drawn therefrom, it becomes a question of law as to whether one is an employee or an independent contractor. Conversely, where the facts as to the agreement between the parties to the transaction are in dispute or are susceptible of more than one interpretation or conclusion, then the relationship of the parties generally becomes a question to be determined by the trier of the facts. Restatement (Second), Agency § 220, comment c (1958); 57 C.J.S. Master and Servant § 530 (1948); 27 Am. Jur. Independent Contractors § 60 (1941).

Id at 80.

Though Wolf did not control Nelson's food consulting and production monitoring, he did direct and control the premises. The leased office and storage, approximately 10' above the office floor, with no stairs or railing in the roof rafters was accessed for Nelson by Defendants' employees. (CP 97, *Nelson Decl. §15*). Defendants also furnished the extension ladder to be used to carry supplies up and down from the storage area. In *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 244-245, 85 P.3d 918 (2004) (reversing summary judgment in favor of the jobsite owner in a safety line fall severely injured a subcontractor's employee), the owner's (Space Needle Corporation) facility manager provided some necessary safety equipment needed for a subcontractor's employees to work at heights. He also instructed them on required safety procedures and

checked their safety practices. That evidence raised a question of fact as to whether Space Needle as the jobsite owner actively controlled and supervised safety activities of the subcontractor's employees.

Plaintiffs have shown that Nelson was working as an independent contractor to whom Defendants owed workplace safety duties. To the extent that Defendants disputes these material facts regarding control of the premise, should be determined at trial.

E. Standards for Summary Judgment Were Not Satisfied.

The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of material fact. *See Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 562, 611 P.2d 737 (1980). The standard of review for summary judgment applies. Under CR 56(c) summary judgment is proper only if the pleadings, affidavits, depositions, and admissions on file, viewed in the light most favorable to the nonmoving party, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 247-248, 85 P.3d 918 (2004); *Iwai v. State*, 129 Wash.2d 84, 95-96, 915 P.2d 1089 (1996). As the moving party, the Defendants must first show the absence of a genuine issue of material fact.

Young v. Key Pharmaceuticals, Inc., 112 Wash.2d 216, 225, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to set forth specific facts showing a genuine issue for trial. CR 56(e); *Young*, 112 Wn.2d at 225. All evidence and all reasonable inferences there from should be considered in a light most favorable to the Nelsons as the nonmoving party. *Van Dinter v. City of Kennewick*, 121 Wash.2d 38, 44, 846 P.2d 552 (1993). In construing the evidence in the light most favorable to the Nelsons, at a minimum, there remain genuine issues of material fact in this case.

V. CONCLUSION

Dale Nelson paid rent for an office and storage place at Wolf Pack. The fact that Wolf Pack did not provide stair access to the mezzanine storage area obvious. However, it was the ladder that was the dangerous instrumentality. Dale Nelson states that the ladder he fell from was the one provided by Wolf Pack to access the mezzanine storage on a regular basis. Wolf denies that he provided any ladder. There exists a clear dispute regarding this material fact.

To the extent the trial court determined that Dale Nelson was an invitee on the premise it is an error of law.

The fact that Dale Nelson did consulting work for and provided other services to Wolf raises the legal issue of whether he is entitled to perform these in a safe work place pursuant WISHA workplace safety codes. Substantial testimony regarding the amount of control Wolf exercised over the premises raised issues of material fact as to whether the scope of those statutes should extend to Nelson. The trial Courts ruling Granting Summary Judgment on both the common law and statutory WISHA claims should be reversed.

DATED this 22 Day of March, 2010.



BRIAN K. LEONARD

WSBA# 18087

Attorney for Plaintiffs/Appellants