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STATE OF WASHINGTON

2009 DEC 17 PM 3:12 ^E

No. 64052-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DEBRA STEWART,

Appellant,

v.

GRIFFITH INDUSTRIES, INC., a Washington Corporation;
GRIFFITH FLOOR COVERING; ROSALES CARPET; CESAR
ALBERTO ROSALES; JANE DOE ROSALES and the marital
community composed thereof and JOHN AND JANE DOES 1-5,

Respondents.

BRIEF OF RESPONDENT GRIFFITH INDUSTRIES, INC.

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III. ASSIGNMENTS OF ERROR

Respondent Griffith Industries, Inc. (“Griffith”), does not assign error to the trial court’s ruling on summary judgment dismissing Appellant’s claims against Griffith.

Appellant’s opening brief on appeal contains no Assignments of Error. To the extent that Appellant has failed to assign error to the trial court’s ruling on summary judgment, Griffith moves to strike the brief for failure to conform to RAP 10.3(a)(4), or to impose sanctions pursuant to RAP 10.7.

IV. STATEMENT OF ISSUES

Griffith disagrees with Appellant’s Statement of Issues and submits the following Statement of Issues which more appropriately reflect the questions before this court:

1. Are there genuine issues of material fact as to whether or not subcontractor Rosales Carpet was an agent of Griffith?
2. Is Griffith vicariously liable for the negligent act of its independent subcontractor when the injured plaintiff is

a third party to whom Griffith owed no contractual duty?

V. STATEMENT OF THE CASE

A. Factual Background

This case arises out of a slip-and-fall accident that occurred on August 9, 2006. CP 49-52. Appellant claims she was injured when she tripped on “adhesive” left behind by workers who installed new flooring in her unit at the Booth Gardens Apartments in Seattle, Washington. CP 51. In her Interrogatory answers, Appellant stated:

After last worker left, I walked though living room to front hallway. As I stepped onto hallway, I was stopped by my shoe sticking and went flying landing by the front door. I made a loud noise landing, and started moaning, the worker came back. He tried to open door but my body was blocking his entry. When he got in, he carried me to my bed and I told him to get the manager to call ambulance...

CP 55.

The manager of Appellant’s apartment complex, United Management, contracted with Griffith Industries to replace the carpet and vinyl flooring in Appellant’s apartment. CP 30. Installing floor covering in apartment buildings is Griffith’s primary business. CP 30. In this case, Griffith subcontracted Rosales Carpet to

perform the actual installation work at Appellant's apartment. CP 30, 33-34.

Rosales Carpet was an independent subcontractor doing business in the State of Washington under license number ROSALC*957QA, which was in effect between 11/1/2005 and 11/1/2007. CP 36-37. The Department of Labor and Industries identified Rosales Carpet's license type as "construction contractor," and its business type as "individual." CP 36. The business specialty is listed as "carpet laying." CP 36. Cesar Alberto Rosales is identified as the business owner. CP 36. The state issued a Construction Contractor Application receipt of payment to Rosales Carpet on 11/01/2005 under UBI # 602 552 207. CP 39.

Griffith obtained state licensing documents from Rosales Carpet for its own records. CP 30. Rosales Carpet also supplied Griffith with a copy of its Contractor's Surety Bond, which became effective on October 25, 2005, and an ACORD Insurance Certificate, which indicates that Rosales Carpet purchased a Commercial General Liability Insurance policy from Ohio Casualty Insurance Co. The policy was in effect between 11/1/2005 and

11/1/2006. CP 40-43. The Department of Labor and Industries is a named certificate holder on the ACORD Certificate. CP 43.

Griffith paid Rosales Carpet ϕ .28 per square foot of carpet and ϕ .89 per square foot of sheet vinyl for its work at the Booth Gardens Apartments, pursuant to an oral agreement between the parties. CP 31. Rosales Carpet was instructed as to where it could pick up the flooring material, and it was provided with the location where the material was to be installed. CP 31. Rosales Carpet was neither an employee nor an agent of Griffith. CP 31. Rosales Carpet worked independently to install the carpet and vinyl flooring at the Appellant's residence. CP 31. No employee of Griffith Industries was onsite to supervise or direct installation. CP 31. Rosales Carpet alone controlled the method and manner of its work. CP 31. Griffith issued payment to Rosales Carpet on August 18, 2006. CP 45.

Gene Hood was Griffith's operations manager at the time of the accident at issue in this case. CP 29. Andrew Griffith was president of the company. CP 118. Both Mr. Hood and Mr. Griffith agree that Rosales was an independent subcontractor, regardless of whether or not the subcontract with Rosales was oral or written

and regardless of whether or not they recall the terms of that subcontract. As Mr. Griffith testified at his deposition:

Q. And on August 9, 2006, which is the date of this incident that we're here for, did you have installers working directly with Griffith at that time?

A. Only our repair technician, who's my father. He's the only employee. All the other installers that we work with are subcontractors, have other businesses.

CP 105. Likewise, Gene Hood stated in his Declaration:

Rosales Carpet was neither employee nor agent of Griffith. Rosales Carpet worked independently to install the carpet and vinyl flooring at the plaintiff's residence. No employee of Griffith Industries was onsite to supervise or direct the installation work, and Rosales Carpet alone controlled the method and manner of its work.

CP 31.

B. Procedural History

Appellant filed suit against both Griffith and Rosales Carpet on March 20, 2008. CP 17-20.¹ Griffith's Answer included the affirmative defense that Appellant's injuries were caused by individuals or entities over which it had no control. CP 17-20. On May 15, 2009, Griffith moved for summary judgment, arguing that the doctrine of vicarious liability was not available under the facts of

¹ There is no indication in the record that Rosales Carpet was ever served.

this case because Rosales Carpet was not its agent or employee. CP 21-28. After considering each party's written materials, supporting declarations and exhibits, and oral argument, the trial court granted Griffith's motion on July 24, 2009. CP 108-110. Appellant filed a Notice of Appeal on August 21, 2009. CP 111-112.

VI. ARGUMENT

A. STANDARD OF REVIEW

Summary judgment decisions are reviewed de novo, with the facts and all reasonable inferences viewed in the light most favorable to the nonmoving party. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 329, 2 P.3d 1029 (2000). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A fact is material if the outcome of the litigation depends on it, in whole or in part. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001). The nonmoving party may not rely on speculation or argumentative assertions. *Pelton v. Tri State Memorial Hosp.*, 66 Wn.App. 350, 355, 831 P.2d 1147 (1992).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, 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 motion.

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

B. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER SUBCONTRACTOR ROSALES CARPET WAS AN AGENT OF GRIFFITH

Washington has consistently recognized the general rule that when a party brings an action in tort, regardless of the particular theory of liability relied upon, he or she has the burden of showing that:

(1) there is a statutory or common-law rule that imposes a duty upon defendant to refrain from the complained-of conduct and that is designed to protect the plaintiff against harm of the general type; (2) the defendant's conduct violated the duty; and (3) there was a sufficiently close, actual, causal connection between defendant's conduct and the actual damage suffered by plaintiff.

Hansen v. Washington Natural Gas Co., 27 Wn.App. 127, 129, 615 P.2d 1351 (1980); *McLeod v. Grant County School Dist.* 128, 42 Wn.2d 316, 255 P.2d 360 (1953). Appellant's theory is that Griffith is vicariously liable for the negligent acts of its subcontractor, Rosales Carpet, because Rosales Carpet was Griffith's "agent." Agency law is not available in this context, however, where Rosales Carpet acted solely as an independent subcontractor.

The existence of an agency relationship depends on the facts and circumstances of each case. *Stansfield v. Douglas County*, 107 Wn.App. 1, 17-18, 27 P.3d 205 (2001). To determine whether an agency relationship exists, a court must look to the spirit of the agreement between the parties. *Patent Scaffolding Co. v. Roosevelt Apartments*, 171 Wn. 507, 511, 18 P.2d 857 (1933), *overruled on other grounds*, *Crown Controls*, 110 Wn.2d 695, 756 P.2d 717. The burden of establishing an agency relationship typically rests upon the party asserting its existence. *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984). As acknowledged by Appellant, agency is a question of law when the facts are undisputed or permit only one conclusion. *Uni-Com N.W., Ltd. v. Argus Publ'g Co.*, 47 Wn.App. 787, 796, 737 P.2d 304 (1987).

“The essential elements of an agency are *control* and *consent*.” *Yong Tao*, 140 Wn.App at 831, *citing Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969) (emphasis added). An independent contractor is generally not considered an agent when the contractor acts in his own right and is not subject to another's control. *Turnbull v. Shelton*, 47 Wn.2d 70, 73, 286 P.2d 676 (1955) (citing 2 Am.Jur. 17, Agency, § 8), *overruled on other grounds*, *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

In this case, Griffith hired independent subcontractor Rosales Carpet to install flooring at the Appellant's unit at the Booth Gardens Apartments. CP 30. Rosales Carpet was neither agent nor employee of Griffith Industries. CP 31. Rosales Carpet maintained its own business licensing with the State of Washington and provided an independent contractor's surety bond and ACORD certificate of insurance to Griffith prior to contracting for work. CP 35-43. Rosales Carpet worked independently to install the carpet and vinyl flooring at the Appellant's residence. CP 31. Griffith's only involvement was to instruct Rosales Carpet as to where it could pick up the flooring material, and the location where the material was to be installed. CP 31. No employee of Griffith

Industries was onsite to supervise or direct the installation. CP 31. Rosales Carpet alone controlled the method and manner of its work. CP 31.

The relevant distinction between an agent and an independent contractor in this context is whether the hiring contractor has:

the right to control the method or manner in which the work was to be done [...] ... if the construction company represented the will of the [hiring contractor] only as to the result of the work, and not as to the means by which it was to be accomplished, then the relation between the parties would be that of **independent contractor**.

Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., Inc., 125 Wn.App. 227, 103 P.3d 1256 (2005), *citing Patent Scaffolding*, 171 Wn. at 510 (emphasis added).

There is no dispute in this case that Rosales Carpet was an “independent contractor” in this case, and not Griffith’s agent. Griffith did not direct Rosales Carpet as to *how* to install the flooring at Appellant’s apartment, nor did it supervise that work. CP 31. Rosales Carpet worked independently and any acts or omissions were entirely on its own behalf.

Appellant failed to meet her burden on summary judgment to raise an issue of fact regarding whether Griffith had an

employer/agent relationship or an independent subcontractor relationship with Rosales Carpet. Appellant tried to create the *illusion* of an issue of fact by offering numerous excerpts from the depositions of Andrew Griffith and Gene Hood. There are no disputes over material facts lurking in this testimony. Both Andrew Griffith and Gene Hood *agree* that Rosales Carpet was, at all times, an independent subcontractor. That they can't recall the precise *details* of the oral contract with Rosales Carpet is irrelevant as to whether Griffith and Rosales Carpet had an independent subcontractor or an agency relationship.

Also *irrelevant* is whether or not the Department of Labor and Industries pushed Griffith to use written subcontracts, whether or not Griffith had a safety program in place, and whether or not Griffith contributed money to other claims in the past.² Not one bit of testimony on these subjects creates a material issue of fact regarding whether or not Rosales was Griffith's agent or an independent subcontractor at the time of Appellant's accident.

² Evidence of prior claims and settlements is inadmissible at trial and cannot be relied on at summary judgment. See ER 402; *Houck v. University of Washington*, 60 Wn.App. 189, 803 P.2d 47 (1991), *review denied*, 116 Wn.2d 1028, 812 P.2d 103 (1991); *Turner v. Tacoma*, 72 Wn.2d 1029, 435 P.2d 927 (1967); *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn.App. 497, 761 P.2d 77 (1988).

In contrast, Griffith presented the (1) job schedule with the Booth Garden Apartments in which Rosales Carpet is identified as the subcontractor on the job; (2) Rosales Carpet's state contractor's licensing documents for the relevant time period, which Griffith obtained as a part of its oral subcontractor agreement; (3) Rosales Carpet's contractor surety bond; (4) An ACORD Certificate of Insurance for Rosales Carpet verifying Rosales had its own CGL policy during the relevant time period; and (5) verification that Griffith paid Rosales as a subcontractor. CP 32-45.

Reasonable minds can reach only one conclusion based on the testimony and the evidence: that Rosales carpet was an independent subcontractor at the time of the accident. Appellant failed to meet her burden of proof on summary judgment regarding this issue. Vicarious liability through a theory of agency is not available under the facts of this case.

C. GRIFFITH IS NOT VICARIOUSLY LIABLE FOR THE NEGLIGENT ACTS OF ITS INDEPENDENT SUBCONTRACTOR WHEN THE INJURED PLAINTIFF IS A THIRD PARTY TO WHOM GRIFFITH OWED NO CONTRACTUAL DUTY

Appellant relies on an exception to the independent contractor rule established in *White Pass Co. v. St. John*, 71 Wn.2d 156, 427 P.2d 398 (1967), and *Board of Regents of University of*

Washington v. Frederick and Nelson, 90 Wn.2d 82, 579 P.2d 346 (1978), to argue that a general contractor is strictly liable for the torts of its independent subcontractor. Appellant is mistaken. Absent a contractual relationship, Washington courts have repeatedly confirmed that a party that hires an independent contractor is not liable for the independent contractor's negligent acts.

1. The *White Pass* exception to the independent contractor rule does not apply where the general contractor and the injured party had no contractual relationship.

As stated by the Court in *Board of Regents*, the *White Pass* exception to the independent contractor rule is thus:

When one contracts to perform a specified service or supply a product of a certain quality, liability for negligent performance of the contract cannot be escaped by engaging an independent contractor to perform the very **duty which the contract requires**.

Board of Regents, 90 Wn.2d at 84 (emphasis added). Both *White Pass* and *Board of Regents* involved duties the general contractor already owed to the plaintiff in those cases by virtue of the contract between them:

The theory of liability is that the contractor has agreed to perform the work specified in the contract. In the absence of a provision that he may subcontract the work and that **the owner** will look only to the subcontractor for compensation for damage if the

work is not properly done, there is an implied undertaking on the part of the contractor to see that the work is performed with due care. As far as his relations with the owner are concerned, the subcontractor employed by him is his agent for whose negligence he is **responsible to the owner**.

Board of Regents, 90 Wn.2d at 84-85 (emphasis added).

In considering the *White Pass* decision, the Ninth Circuit observed:

...the Washington Supreme Court there held that the general contractor owed a nondelegable duty **to the owner of the property**, even for tasks that were not inherently dangerous. "The fact that the respondent [general contractor], by virtue of its contract with the subcontractor, exercised no supervision and control over the manner in which the work was performed, could not absolve it from its responsibility **under its contract with appellant**."

Allstate Ins. Co. v. Hughes, 358 F.3d 1089, 1093 (9th Cir. 2004) (emphasis added), citing *White Pass*, 71 Wn.2d at 160.

The foundation of the *White Pass* exception to the independent contractor rule is the contract between the general contractor and the owner (who, under this theory, is also the injured plaintiff). The *Board of Regents* Court recognized that the *White Pass* rule:

depends upon the nature of the **contractual obligations** of the person sought to be held liable for the acts of a third person. Here defendant [subcontractor] Rademacher was performing a duty

which had been contractually assumed by the two other defendants. Those defendants allowed Rademacher to fulfill their obligations to bring the furniture up to specifications and they are liable for his actions in performing their **contractual duties**.

Board of Regents, 90 Wn.2d at 85 (emphasis added). The purpose of the rule is to prevent the general contractor from escaping its duties to **the party with whom it contracted** by hiring a subcontractor to do the work. The rule is **not** that the general contractor is strictly liable to *anyone* damaged by an independent subcontractor's act of negligence. This stretches the concept of duty too far.

In this case, Griffith and the Appellant had no contractual relationship, and Griffith owed her no duty. The *White Pass* exception to the independent contractor rule cannot supply the basis for Appellant's recovery against Griffith.

2. One who engages an independent contractor is not vicariously liable for that contractor's independent torts.

The correct analysis is provided in *Gaines v. Pierce County*, 66 Wn.App. 715, 834 P.2d 631 (1992), and *Woodrome v. Benton County*, 56 Wn.App. 400, 783 P.2d 1102 (1989).

In *Gaines*, the court confirmed that "one who engages an independent contractor is not vicariously liable for the independent

contractor's conduct." *Gaines*, 66 Wn.App. at 725, citing *Getzendaner v. United Pac. Ins. Co.*, 52 Wn.2d 61, 67, 322 P.2d 1089 (1958) ("It is the general rule that an employer is not liable for the torts of an independent contractor").

In *Woodrome*, a fair patron who was injured while attending a stunt show at a county fair brought suit against the counties and the fair association, alleging they were negligent in failing to verify that the independent contractor performing the stunt show had liability insurance covering its patrons. The court stated:

The intervening contractual relationship determines the liability to third parties in this instance. It is undisputed the Stunt Show was an independent contractor hired by the Fair Association to perform at the fair. It is also undisputed it was the Stunt Show's responsibility to procure liability insurance, which it represented that it had. **A party who hires an independent contractor is absolved from liability for the independent contractor's negligent acts.** The Counties and the Fair Association as employer of the independent contractor Stunt Show are immune from liability for the Stunt Show's failure to procure liability insurance for the benefit of Mr. Woodrome, as would be a private person or corporation.

Woodrome, 56 Wn.App. at 407 (emphasis added), citing the Restatement (Second) of Torts § 426, at 413 (1965); and *Chapman v. Black*, 49 Wn.App. 94, 100, 741 P.2d 998, review denied, 109 Wn.2d 1005 (1987).

Woodrome provides the reasoning applicable to this case, were the alleged *independent negligent acts* of Griffith's subcontractor proximately caused the Appellant's injuries, and the Appellant was not a party to whom Griffith owed any contractual duty. Appellant's case relies solely on doctrine of vicarious liability to impose liability against Griffith for the actions of independent contractor Rosales Carpet. Appellant is essentially asking the court to find Griffith strictly liable for the negligence acts of its subcontractor, despite a complete lack of any evidence that *Griffith* did anything wrong.

Washington Courts have already declined to impose strict liability on general contractors for the negligence of their subcontractors, even under the expansive directive of *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 457, 788 P.2d 545 (1990), which established a broad duty general contractors owe to the employees of its subcontractors to provide for workplace safety.

Stute is distinguishable because the cause of the accident in that case was known. *Stute* slipped. The only issue was whether the general contractor owed the employee of a subcontractor a duty to comply with specific regulations promulgated under WISHA. The court held that the general contractor owed *Stute* such a duty. ***Stute* did not hold that a general contractor is liable for injuries to the employee of a subcontractor regardless [of] whether the**

general contractor's failure to comply with safety regulations caused the accident.

Little v. Countrywood Homes, Inc. 132 Wn.App. 777, 783-84, 133 P.3d 944 (2006) (emphasis added). In other words, the *Little* Court rejected the notion that a general contractor is strictly liable for all workplace accidents, especially in the absence of any evidence that *the general contractor* itself breached any duty causing the plaintiff's injuries.

In this case, Appellant can present no evidence that Griffith itself breached any duty that proximately caused Appellant's injuries. The element of proximate cause requires both cause in fact and legal causation. *Ang v. Martin*, 154 Wn.2d 477, 482, 114 P.3d 637 (2005). "Cause in fact" refers to a physical connection between an act and the injury. *Id.* at 482. Here, Appellant alleges that Rosales Carpet's negligence in leaving glue on the floor it installed is the cause-in-fact of her injury. CP 51. But the cause-in-fact analysis *also* requires Appellant to establish that the harm she suffered would not have occurred *but for* an act or omission of *the defendant*. *Joyce v. State*, 155 Wn.2d 306, 119 P.3d 825, 833 (2005). Cause-in-fact is a question of law when the facts, and inferences from them, are plain and not subject to reasonable doubt

or a difference of opinion. *Daugert v. Pappas*, 104 Wash.2d 254, 257, 704 P.2d 600 (1985).

Griffith was not present at Appellant's apartment when Rosales Carpet did its work. Appellant has no direct theory of liability against Griffith. Appellant cannot claim that *but for* an act or omission of Griffith her injuries would not have occurred. Appellant is unable to meet the cause-in-fact bar as a matter of law. Again, her claim is founded solely on the notion that Griffith is vicariously liable for the Rosales Carpet's independent tort.

Washington Courts do not automatically hold general contractor's liable for their independent subcontractor's acts of negligence. In *Bozung v. Condominium Builders, Inc.*, 42 Wn.App. 442, 711 P.2d 1090 (1985), for example, the Court declined to impose strict liability on a general contractor for its subcontractor's WISHA violations.

Bozung, however, contends that Builders should be held responsible for Tucci's violation of WISHA regulations. Tucci apparently violated WAC 296-155-950, which requires rollover protection equipment on scrapers. The *Goucher* court did not reach the question of a general contractor's responsibility for injuries caused by a subcontractor's violation of WISHA regulations. Federal courts, however, have held that an employer's responsibility for safety violations under the specific duty clause is limited to those violations which the employer reasonably could

have been expected to prevent or abate by reason of its supervisory authority. See *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 601 (2d Cir.1975). Even if we accept this interpretation, Builders would not be responsible for Tucci's violation of safety regulations. As we have determined previously, Builders' **supervisory responsibility did not extend to control over the manner of Tucci's performance nor did it extend to control over safety practices.** The policy underlying the statutory requirement that an employer comply with safety regulations for the protection of all employees would be stretched beyond reason if Builders would be liable, under the facts of this case, for injuries caused by Tucci's failure to provide rollover protection on its scrapers.

Thus, Builders had no statutory duty that encompasses responsibility for Bozung's injuries. Because no duty existed as a matter of law, summary judgment on this issue was proper.

Bozung, 42 Wn.App. at 451-52. Summary Judgment was similarly proper in this case, where Rosales Carpet acted strictly as an independent contractor and Griffith exercised no supervisory responsibility over the method and manner of its performance. Appellant's suit against Griffith was properly dismissed as a matter of law.

3. The Restatement (Second) of Torts § 429 and § 426 should be applied to absolve a contractor from liability for an independent contractor's negligent acts.

Appellant relies on comments to the *Restatement (Second) of Torts* § 429 and § 426 to argue that Griffith is liable for the

negligence of Rosales Carpet so long as “the negligence in the course of the operation is within the risk contemplated...” *Restatement (Second) of Torts* § 426 cmt. A (1965). This is not an argument that was before the court on summary judgment and it is improperly presented on appeal.

The *Woodrome* Court relied on § 426 to determine that a “party who hires an independent contractor is absolved from liability for the independent contractor’s negligent acts.” Indeed, § 426 states:

Except as stated in sec. 428 and 429, an employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor if

- (a) the contractor’s negligence consists solely in the improper manner in which he does the work, and
- (b) it creates a risk of such harm which is not inherent in or normal to the work, and
- (c) the employer had no reason to contemplate the contractor’s negligence when the contract was made.

Restatement (Second) of Torts § 426 (1965). In this case, Rosales Carpet’s alleged negligence consisted in the allegedly improper manner in which it did the work, which created a risk of harm not “inherent” in the work and which Griffith had no reason to

anticipate. Of course, Griffith expects that its independent contractors will perform the contracted work correctly.

According to § 426, Comment A, an employer is not liable for the “collateral negligence” of an independent contractor. “Collateral negligence” is described as negligence which is “unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the normal or contemplated risk.” *Restatement (Second) of Torts* § 426 cmt. A (1965).

It is Griffith’s position that Rosales Carpet’s alleged negligence in leaving glue on the flooring it installed is just such a “collateral risk” contemplated by Comment A to § 426. This action is not inherent in the work and Griffith had no reason to contemplate such negligence in subcontracting the job at the Appellant’s apartment.

Moreover, no published Washington opinion has cited the Restatement (Second) of Torts § 426 or § 429 in circumstances *other* than to establish that a contractor is not vicariously liable for the torts of its independent subcontractor:

Finally, if the alleged dangerous activity or condition was caused solely by the act or omission of the

independent contractor, we recognize that generally there is no liability on the part of the principal:

Except as stated in [Restatement (Second) of Torts §§] 410-429 [(1965)], the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

Kamla v. Space Needle Corp., 147 Wn.2d 114, 130, 52 P.3d 472 (2002) (Chambers, J., dissenting), *citing Restatement (Second) of Torts* § 409 (1965); *see also Woodrome, supra*.

VII. CONCLUSION

The trial court properly dismissed Appellant's claims against Respondent Griffith. Appellant failed to meet her burden on summary judgment to raise a genuine issue of material fact as to whether or not Rosales Carpet was an agent Griffith. All relevant evidence indicates Rosales Carpet was an independent subcontractor, and as such, the law of agency does not apply. Moreover, Washington caselaw establishes that Griffith is not vicariously liable for the negligent acts of its independent subcontractor when the injured plaintiff is a third party to whom it owed no contractual duty. The trial court properly considered and rejected each of Appellant's unfounded claims. The Order dismissing Griffith ruling should be affirmed.

DATED this 16th day of December, 2009.

FALLON & MCKINLEY

Respectfully submitted:

By: 
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Kimberly A. Reppart, WSBA #30643
Attorneys for Respondent Griffith
Industries, Inc.

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Tamara Howie, being first duly sworn on oath, deposes and states:

That on the 17th day of December, 2009, she caused to be sent via ABC Legal Messenger for delivery by the 17th of December, 2009, Brief of Respondent Griffith Industries, Inc; Table of Contents; Table of Authorities; and this Affidavit of Service to the below listed parties in the above-captioned matter:

Jamila Taylor, Esq.
J.D. Smith, Esq.
J D Smith Attorney at Law PLLC
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Seattle, WA 98101

Robert Reinhard
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Notarial jurat on next page.

Tamara Howie

SUBSCRIBED and SWORN to before me this 17th day of December, 2009.

Judith E. Hong
SIGNATURE



Judith E. Hong
PRINT NAME
NOTARY PUBLIC in and
for the State of
Washington, residing at
heurt
My commission expires
5-26-10