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NO. 66404-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellants,

v.

FRYE BUILDING LIMITED PARTNERSHIP,
a Washington Limited Partnership,

Respondent.

BRIEF OF RESPONDENT

Thomas R. Merrick, WSBA #10945
David S. Cottnair, WSBA #28206
Attorneys for Respondent Frye Building
Limited Partnership

MERRICK, HOFSTEDT & LINDSEY, P.S.

3101 Western Ave., Suite 200
Seattle, WA 98121
Telephone: (206) 682-0610
Facsimile: (206) 467-2689

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A. INTRODUCTION

Plaintiff Timothy Smith was a maintenance supervisor for the Archdiocesan Housing Authority (“AHA”). One of the properties he worked at was the Frye Building, owned by Frye Building Limited Partnership (“Frye”).

While at work on July 5, 2007, plaintiff slipped and fell in the laundry room at the Frye Building. Plaintiff never notified Frye of any leaks in the laundry room.

Frye moved for summary judgment on the grounds that plaintiff could not present admissible establishing all essential elements of plaintiff’s case under Restatement (Second) of Torts § 343. Additionally, Frye’s independent contractor, and plaintiff’s employer, AHA, was responsible for maintaining the Frye Building. An employer of an independent contractor does not owe the contractor’s employees a common law duty of care for workplace safety, and Frye did not retain control over the manner in which plaintiff or AHA performed their maintenance work.

The trial court correctly determined that plaintiff failed to present admissible evidence establishing each element of his claim under Restatement (Second) of Torts, § 343 (1965) and granted Frye’s motion for summary judgment.

B. STATEMENT OF THE ISSUES

1. Did plaintiff present admissible evidence establishing each element of a claim against a property owner under Restatement (Second) of Torts, § 343?

2. Did Frye owe plaintiff a non-delegable duty to ensure worksite safety?

3. Did Frye retain control over the manner in which plaintiff performed his work to vitiate the general rule of nonliability for injuries to employees of independent contractors?

C. STATEMENT OF THE CASE

In 1998, Frye retained AHA to manage the Frye Building. CP 21, CP 24-39. Under this agreement, the AHA was responsible for overseeing the rentals and the building maintenance. Plaintiff Timothy Smith was employed by the AHA as the building maintenance manager.

The management agreement required the AHA to:

[M]aintain the Project in a decent, safe and sanitary condition and in a rentable state of repair ... including but not limited to cleaning, painting, decorating, plumbing, carpentry, grounds care, and other such maintenance and repair work as may be necessary.

CP 28 at ¶ 3.7.

The relationship created by the management agreement was that of an independent contractor. CP 37 at ¶ 13.7¹

As the maintenance manager, Plaintiff was responsible for maintaining the Frye Building on behalf of the AHA. CP 140, ln. 19-22:

Q. And can you tell me what your job duty were at the Frye?

A. Basically overseeing the maintenance of the facility, exterior and interior, common areas and residents.

If a repair was less than \$1,000.00, Plaintiff would not even notify the owner. CP 145, ln. 17-19.

The laundry room was monitored for leaks and mopped daily. CP 142, ln. 21-25. Plaintiff did not notice water on the laundry room floor that day. CP 69. Plaintiff never notified the owner of any leaks in the laundry room. CP 146, ln. 18-20.

After he fell, plaintiff had another maintenance worker fix the leak the same day, and plaintiff did not need to contact anybody for approval before having this leak repaired. CP 143-144.

¹ Plaintiff's repeated citations to CP 30 as creating an express principal-agent relationship is wrong. The express relationship created is that of independent contractor. CP 37. That plaintiff continues to make these false statements even after Frye informed them of their inaccuracy is concerning. CP 123-CP 124 at fn.10.

D. ARGUMENT

1. Standard of Review.

Plaintiff's Notice of Appeal seeks review of the Order Denying Plaintiff's Motion for Reconsideration entered on December 2, 2010. CP 166. The standard of review of a trial court's decision to grant or deny a motion for reconsideration is abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 150, 89 P.3d 726 (2004).

The appellate court will review a final judgment not designated in the notice if the notice designates a timely post-trial motion based upon CR 59. RAP 2.4(c). The standard of review of an order on summary judgment is de novo, with the appellate court engaging in the same inquiry as the trial court. *Brower v. State*, 137 Wn.2d 44, 52, 969 P.2d 42, *cert. denied*, 526 U.S. 1088 (1999).

2. Summary Judgment Standard

A defendant may move for summary judgment by simply pointing out to the Court that there is an absence of evidence to support the plaintiff's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548 (1986). Then the inquiry shifts to the party with the burden of proof at trial, the plaintiff, to establish all elements essential to that party's case. *Id.* In order to make this showing, the party opposing summary

judgment must submit “competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). If a non-moving party fails to make a showing sufficient to establish the existence of an element of that party’s case, and on which that party bears the burden of proof at trial, then summary judgment should be granted. *Young*, 112 Wn.2d at 225. In such situations, there can be “no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of a non-moving party’s case necessarily renders all other facts immaterial.” *Id.*, citing *Celotex*, 477 U.S. at 322-23.

The non-moving party may not rest upon the mere allegations or denials of its pleadings. In order for the non-moving party to prevail on a motion for summary judgment, the party must either, by affidavits or as otherwise provided in the civil rules, set forth specific facts showing that there is a genuine issue for trial. CR 56(e). The non-moving party may not rely on speculation or argumentative assertions that unresolved factual issues remain, but instead “must set forth specific facts that sufficiently rebut the moving party’s contentions.” *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

3. Trial Court Properly Found Plaintiff Failed to Present Admissible Evidence Establishing Each Element of His Negligence Claim.

In premises liability cases such as this, the mere fact of an accident is not evidence of a property owner's negligence. *Brant v. Market Basket Stores*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967); *see also Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 199, 831 P.2d 744 (1992) (mere existence of accident insufficient proof of unreasonable risk). A property owner is not a guarantor of safety. *Mucsi v. Graoch Assoc.*, 144 Wn.2d 847, 859, 31 P.3d 684 (2001). Property owners are also not insurers as to all accidents that might happen on their premises. *Coleman v. Ernst Home Center*, 70 Wn. App. 213, 222, 853 P.2d 473 (1993).

Negligence has four elements, each of which must be satisfied for an action based in negligence to be cognizable. The plaintiff must prove: (1) there was a duty owed to the plaintiff by the defendant, (2) the defendant breached that duty, (3) the plaintiff sustained a harm, and (4) the harm was proximately caused by the defendant's breach of its duty to the plaintiff. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). Here, plaintiff's failure of proof with respect to even one of the elements of its claims meant summary judgment must be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

**A. Plaintiff Failed to Produce Evidence Establishing
Restatement (Second) of Torts § 343 Elements.**

The trial court correctly determined that whether Frye was liable to plaintiff was to be analyzed under Restatement (Second) of Torts, § 343 (1965). RP 20; *Iwai v. State*, 129 Wn.2d 84, 93-94, 915 P.2d 1089 (1996).

The Restatement imposes liability on a landowner to an invitee only if the landowner:

(1) 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

(2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

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

Iwai v. State, 129 Wn.2d 84, 93-94, 915 P.2d 1089 (1996).

Plaintiff failed to establish each of these elements. Plaintiff failed to present admissible evidence that Frye had actual or constructive knowledge of the alleged leak at the P-trap under the laundry room sink. CP 142-144. Plaintiff, the maintenance supervisor, had not even noticed the leak at the P-trap even though he monitored the laundry room and had it mopped every day. CP 69, CP 142. Plaintiff never informed Frye of any leaks in the laundry room. CP 145. The conclusory Gonzales

declaration does not even claim that AHA had knowledge of a temporary leak in the laundry room sink P-trap on July 5, 2007. CP 59–62. The absence of a landowner’s actual or constructive notice of a dangerous condition precludes recovery. *See, i.e., Wiltse v. Albertson’s Inc.*, 116 Wn.2d 452, 458, 805 P.2d 793 (1991).

Plaintiff also failed to present admissible evidence establishing the second prong of the first § 343 element – that Frye should realize that it involves an unreasonable risk of harm to plaintiff. The evidence at summary judgment was to the contrary. Plaintiff admitted that part of his job as maintenance supervisor was to discover maintenance issues and have them repaired. CP 140. Therefore, in addition to failing to provide admissible evidence that Frye had knowledge of the condition of the P-trap, plaintiff failed to present any evidence that Frye should realize that the P-trap involved an unreasonable risk of harm to AHA’s maintenance supervisor Timothy Smith.

Similarly, there is no evidence establishing the second element under Restatement (Second) of Torts, § 343 – that Frye should expect that the maintenance supervisor hired by AHA would not discover or realize the danger, or fail to protect himself against it. Plaintiff admits his job was to oversee the maintenance of the facility. CP 145, ln. 17-19. The room

where the leak occurred was monitored for such leaks, and mopped daily. CP 142, ln. 21-25.

Finally, there is no admissible evidence establishing the third element under the Restatement – that Frye failed to exercise reasonable care to protect plaintiff from the leaky utility sink P-trap. In addition to the fact that Frye was unaware of the condition of the P-trap, AHA and plaintiff himself had the authority to repair such conditions on the spot. Plaintiff admits he had one of his employees fix the leak the very day he fell, and he did not need to contact anyone for approval before having it repaired. CP 143–145.

The trial court properly granted Frye’s motion for summary judgment because plaintiff failed to present admissible evidence establishing a cause of action under Restatement (Second) of Torts, § 343.

B. Frye Did Not Owe Plaintiff a Non-Delegable Duty to Ensure Worksite Safety.

Plaintiff’s attempt to rely upon the *Griffiths* case to impose a non-delegable duty to ensure the safety of employees of its independent contractors is misplaced.² *Griffiths* was a breach of contract case involving a contract wherein the owner agreed to indemnify the property

² *Griffiths v. Henry Broderick, Inc.*, 27 Wn.2d 901 (1947), *overruled by Jones*, 84 Wn.2d 518 (1974).

manager. The underlying plaintiff had no involvement whatsoever with contracting to manage the property. On the contrary, here, plaintiff was the maintenance supervisor of the company Frye contracted with to maintain the property. AHA and more specifically, plaintiff, were being paid to fulfill the duty of maintaining the premises to protect third parties. Moreover, an employer of an independent contractor does not owe the contractor's employees a common law duty of care for workplace safety. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002).

The trial court properly declined plaintiff's request to turn property owners into insurers. RP 21. The trial court also recognized that plaintiff was improperly mixing together construction contract cases involving general contractors with premises liability situations such as this. *Id.* Frye, as an owner, did not owe plaintiff a non-delegable duty to ensure worksite safety. Therefore, Frye respectfully requests that this court affirm the dismissal of plaintiffs' claims.

C. Frye Did Not Retain Control Over The Manner In Which Plaintiff Performed His Work.

The management agreement between Frye and AHA states the relationship is one of an independent contractor. CP 37, ¶ 13.7.

Under common law, an employer is not liable for injuries to employees of independent contractors. *Kamla v. Space Needle Corp.*, 147

Wn.2d 114, 119, 52 P.3d 472 (2002). The only exception to this “general rule of nonliability” is where the owner retains control over the actual performance of the work. Retained control does not exist where a party merely retains the right to inspect the work to ensure the contractor has fully complied with the contract terms. *Id.*, at 120-21; *see also, Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 802 P.2d 790 (1991) (right to inspect and supervise to insure proper completion of the contract does not vitiate independent contractor relationship). Also, control over the mere timing of the work does not amount to control over the performance of the work. *Kamla*, 147 Wn. 2d at 121, *citing Straw v. Esteem Construction Co.*, 45 Wn. App. 869, 875, 728 P.2d 1052 (1986). In addition, the right to order the work stopped, to control the order of the work, or to inspect the progress of the work does not equate to control over the method of the work. *Id.*, *citing Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 447, 711 P.2d 1090 (1985). The court in *Kamla* held that the proper inquiry becomes whether there is a retention of the right to direct the manner in which the work is performed. *Kamla*, 147 Wn.2d at 121.

Here, summary judgment was proper because plaintiff failed to present evidence that Frye retained control to direct the manner in which AHA and plaintiff performed his work. The evidence established Frye did not retain such control. The contract provides that “Manager shall, at

Owner's expense, maintain the Project in a decent, safe and sanitary condition...." CP 28, at ¶ 3.7. Plaintiff admits he had the duty of overseeing the maintenance of the facility, and did not even claim Frye could direct the manner in which he performed his work. CP 140. He had full authority to run the maintenance department in a manner he saw fit, and did not even inform Frye if an expenditure was less than \$1,000. CP 145. Frye did not retain the right to control the manner in which plaintiff went about performing his job.

Frye is not liable for injuries to employees of its independent contractor, and summary judgment was proper.

E. CONCLUSION

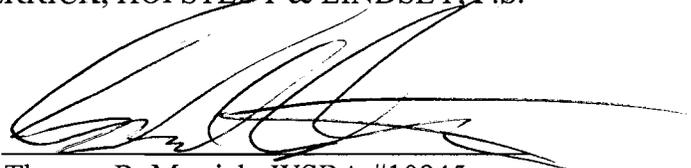
The trial court properly determined that the liability, if any, of property owner Frye was to be evaluated under Restatement (Second) of Torts, § 343 (1965). Plaintiff failed to present admissible evidence establishing his claim under the Restatement. Additionally, the trial court denied plaintiff's invitation to impose a non-delegable duty of worksite safety upon property owners.

Plaintiff, the maintenance supervisor for the Frye Building admitted he did not notice water leaking from the P-trap in the laundry room, and that he never informed Frye of any leaks in the laundry room.

The trial court properly granted summary judgment dismissal of plaintiff's claims, and that decision should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of April, 2011.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By 

Thomas R. Merrick, WSBA #10945

David S. Cottnair, WSBA #28206

Attorneys for Respondent Frye Building
Limited Partnership

MERRICK, HOFSTEDT & LINDSEY, P.S.

3101 Western Ave., Suite 200

Seattle, WA 98121

Telephone: (206) 682-0610

Facsimile: (206) 467-2689

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the **Brief of Respondents** was served April 6, 2011, on the following individuals:

Attorneys for Plaintiffs:

Paul M. Veillon
Wattel and York, LLC
6314 19th St W, Ste. 15
Fircrest, WA 98466-6223

Mr. Bradley K Crosta
Crosta & Bateman
1001 Fourth Avenue Plaza
Seattle, WA 98154

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

EXECUTED this 6th day of April, 2011, at Seattle, Washington.


S. Jean Ballard, Assistant to
David S. Cottnair, WSBA #28206