IN THE COURT OF APPEALS 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.	)	No. 66404-2-I DIVISION ONE UNPUBLISHED FILED: March 19, 2012

Cox, J. — An owner of land owes an invitee a duty of care concerning a condition on the land if the owner knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to the invitee.[1] Here, Timothy Smith fails to show there is any genuine issue of material fact regarding the first prong of the test for landowner liability to an invitee. Moreover, he fails to show that the landowner had a duty to provide a safe jobsite.

[1] Restatement (Second) of Torts § 343; Iwai v. State, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996).

Smith also fails to show there are any genuine issues of material fact regarding Frye's alleged delegation of any duty to the Archdiocesan Housing Authority (AHA). Finally, there are no genuine issues of material fact regarding causation or comparative fault. Frye Building Limited Partnership (Frye), the landowner in this action, was entitled to judgment as a matter of law. We affirm.

The Frye apartment building is owned by Frye. The AHA manages the building based on a Property Management Agreement with Frye. Timothy Smith was the Facility Manager for AHA and worked at the building. Smith's duties included overseeing the maintenance and upkeep of the facility, including the plumbing, laundry, and floors.

While working, Smith slipped and fell on a puddle of water in the building's laundry room. Smith suffered injuries as a result of this fall. The puddle was the result of a leaking pipe on one of the sinks in the laundry room.

Smith sued Frye for negligence. He did not sue AHA, his employer, due to its immunity from liability under Washington's Industrial Insurance Act.[2]

Frye moved for summary judgment, which the trial court granted. The trial court then denied Smith's motion for reconsideration.

Smith appeals.

NEGLIGENCE

Smith argues that the trial court erred in granting Frye's motion for

[2] See RCW 51.04.010.

summary judgment and denying his motion for reconsideration. We disagree.

This court reviews de novo a summary judgment order, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[3] A moving defendant meets its initial burden by pointing out that there is an absence of evidence to support the plaintiff's case.[4] Then, the inquiry shifts to the plaintiff to set forth specific facts demonstrating a genuine issue for trial.[5] The plaintiff may not rely on speculation or argumentative assertions that unresolved factual issues remain.[6] Summary judgment may be entered if the nonmoving plaintiff fails to establish the existence of an element essential to its case.[7]

We review the trial court's order denying a motion for reconsideration for abuse of discretion.[8]

The mere occurrence of an accident and an injury do not necessarily lead to an inference of negligence.[9] To establish negligence, the plaintiff must prove

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[3] Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

[4] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989).

[5] Id. at 225.

[6] Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 377, 972 P.2d 475 (1999) (citing Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991)).

[7] Young, 112 Wn.2d at 225.

[8] Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (citing Perry v. Hamilton, 51 Wn. App. 936, 938, 756 P.2d 150 (1988)).

[9] Marshall, 94 Wn. App. at 377-78 (citing Tinder v. Nordstrom, Inc., 84

the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury.[10] The existence of a duty turns on the foreseeability of the risk created.[11]

The legal duty owed by a landowner to a person entering the premises depends on whether the person is a trespasser, licensee, or invitee.[12] Smith's status as an invitee is not contested.

Washington has adopted the Restatement (Second) of Torts § 343 for analyzing when a landowner is liable to an invitee.[13] It states:

> 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
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> ***(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
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger.[14]

Wn. App. 787, 792-93, 929 P.2d 1209 (1997)).

[10] Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 605, 257 P.3d 532 (2011) (quoting Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998) (citing Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984))).

[11] Higgins v. Intex Recreation Corp., 123 Wn. App. 821, 837, 99 P.3d 421 (2004) (quoting Rasmussen v. Bendotti, 107 Wn. App. 947, 956, 29 P.3d 56 (2001)).

[12] Iwai, 129 Wn.2d at 90-91 (citing Younce v. Ferguson, 106 Wn.2d 658, 662, 724 P.2d 991 (1986)).

[13] Id. at 93 (citing Ford v. Red Lion Inns, 67 Wn. App. 766, 770, 840 P.2d 198 (1992)).

[14] Restatement (Second) of Torts § 343 (emphasis added).

Here, the trial court granted summary judgment for Frye because it determined that, based upon Smith's own deposition testimony, the Restatement was not satisfied because there was no showing of knowledge of the condition. Smith testified as follows:

> Q. Had anyone ever complained of water leaking in the laundry room?
>
> A. Not that I would recall unless it had passed through a work order.
>
> Q. So you had never heard of a water leak in the laundry room?
>
> A. I don't recall.
>
> Q. Would it seem reasonable, then, in a 100-year building in a laundry room that this might be an area that there could be leaks?
>
> A. Sure.
>
> Q. So it would be reasonable that this should be an area that should be monitored for leaks?
>
> A. It was mopped daily.
>
> . . . .
>
> Q. What did you do about the leak to the laundry room sink [after it was discovered]?
>
> A. Had it repaired.
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> . . . .
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> Q. Did you need to contact anybody for approval before having this leak repaired?
>
> A. No.
>
> Q. You just did it on your own?

A. Yes.
. . . .

Q. Did you ever notify [the Low Income Housing Institute, Frye's general partner,] of any leak issues in the laundry room?

A. No.

Q. Other than this sink issue, were you aware of any other leaks in the laundry room?

A. No.[15]

There is no evidence in the record that Frye knew or should have known that the sink was leaking. The absence of such evidence establishes that Smith failed to meet his burden to show the existence of a material fact. When there is no evidence supporting an essential element no other facts can be material because they would not affect the outcome at trial.[16] Thus, we need not consider any other factual disputes with respect to any other parts of the liability test for landowners. The trial court properly granted summary judgment to Frye.

Smith argues that Frye had a non-delegable duty to provide him with a safe workplace and to ensure that AHA complied with the Washington Industrial Safety and Health Act's (WISHA) Core Rules. He is wrong.

In Kamla v. Space Needle Corp.,[17] the supreme court considered whether the owner of a building had a statutory duty under WISHA to maintain a safe

[15] Clerk's Papers at 142-44, 146.

[16] Young, 112 Wn.2d at 225 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

[17] 147 Wn.2d 114, 52 P.3d 472 (2002).

working environment for a general contractor's employees.[18] The court held that a jobsite owner has no such duty to the employees of independent contractors, provided the owner does not retain control over the manner in which such contractor completes its work.[19] The court defined an "independent contractor" as "'a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control ***with respect to his physical conduct in the performance of the undertaking***.'"[20] Thus, in that case, Space Needle was not liable for the worker's injuries because it did not retain the right to control the manner in which the contractor completed its work.[21]

Smith argues that Frye maintained the right to control AHA's work in the parties' agreement. This argument is unpersuasive. The parties' Property Management Agreement states:

> 13.7 ***Relationship***. Nothing contained in this Agreement shall be construed to create a relationship of employer and employee between Owner and Manager, it being the intent of the parties hereto that the relationship created hereby is that of an independent contractor.[22]

While the above language is not dispositive, the other provisions of this

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[18] Id. at 117.

[19] Id. at 125.

[20] Id. at 119 (quoting Restatement (Second) of Agency § 2(3)).

[21] Id. at 121-22.

[22] Clerk's Papers at 37.

agreement on which Smith relies do not advance his argument. For example, none of the following provisions shows a right to control: (1) Frye was responsible for the expense associated with maintaining the building in a safe condition; (2) Frye retained responsibility for determining the condition of the premises that is considered acceptable; and (3) Frye reserved the right to approve or disapprove yearly property budgets. Because none of these provisions affects the "physical conduct" of AHA's performance of maintenance duties, Frye did not retain control of AHA in the manner that Kamla describes.

Smith argues that Frye exercised control over AHA's work as a matter of law because, under agency law, the principal has the right to control the manner in which the agent performs its duties. This argument does not advance Smith's cause.

A principal is not liable for the torts of its non-servant agents, meaning those agents who do not surrender control of their physical actions.[23] The rationale for this rule is stated in McLean v. St. Regis Paper Co.:[24]

> If the rule were otherwise, then in many true agency situations unwarranted vicarious tort liability would attach; for example, the client would be responsible for the negligent physical conduct of his attorney; or the factor, the broker, the independent contractor salesman, or the architect—all who are agents in the broad, generic sense could impose liability on their respective clients for negligent physical acts wholly beyond the client's ability to

[23] O'Brien v. Hafer, 122 Wn. App. 279, 288 n.36, 93 P.3d 930 (2004) (citing Restatement (Second) of Agency "Torts of Servants—Introductory Note" § 219).

[24] 6 Wn. App. 727, 496 P.2d 571 (1972).

[25] Id. at 730.

control.[25]

Frye did not retain control over AHA's actions simply because it was the principal. Because Frye did not control the way in which AHA physically performed its duties, AHA was a non-servant agent.

Smith argues that Kamla is not applicable here because that decision was meant to protect ignorant corporations, not experienced property managers. This characterization is without foundation, and we reject it.[26]

Smith argues that Frye cannot delegate its duty to maintain a safe premise to AHA and, therefore, limit its liability to invitees. He also argues that he was not at fault for his own injuries. Because Frye did not breach its duty, the question of delegation to another is irrelevant for summary judgment purposes.

Smith argues that Frye was negligent because it failed to properly fund the maintenance program, despite knowing that the building was in disrepair. The principle problem with this argument is that it is not supported by any evidence in or citation to the record. Accordingly, we do not further examine this argument.[27]

Finally, Smith argues that, even if Frye was not negligent, it is vicariously liable for AHA's negligent acts and omissions. We disagree.

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[25] Id. at 730.

[26] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (the court need not consider an issue absent persuasive argument and citation to legal authority).

[27] Id.

It does not appear that the trial court addressed this claim. But we may affirm the trial court's ultimate decision on any grounds established by the pleadings and supported by the record.[28] Here, even assuming that Smith presented evidence raising a genuine issue of material fact that AHA was negligent, Frye cannot be vicariously liable for AHA's acts and omissions. "Vicarious tort liability arises only where one engaging another to achieve a result controls or has the right to control the details of the latter's physical movements."[29] As discussed in detail above, Frye did not control the way in which AHA physically performed its duties. Therefore, Frye cannot be vicariously liable for Smith's injuries.

Smith also argues that Frye cannot use an "empty-chair" defense to escape liability for negligence committed by AHA. Under that defense, which is now prohibited,[30] a defendant asks the jury to allocate fault and damages to another who is concurrently liable but immune from suit.[31] As a result, the defendant only pays for his own liability.[32] Nothing in the record indicates that Frye attempted to avoid liability based on an "empty chair" defense. Therefore,

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[28] Verbeek Properties, LLC v. GreenCo Environmental, Inc., 159 Wn. App. 82, 90, 246 P.3d 205 (2010) (citing Otis Housing Ass'n, Inc. v. Ha, 165 Wn.2d 582, 587, 201 P.3d 309 (2009)).

[29] McLean v. St. Regis Paper Co., 6 Wn. App. 727, 732, 496 P.2d 571, review denied, 81 Wn.2d 1003 (1972).

[30] Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 128 Wn.2d 745, 759 n.7, 912 P.2d 472 (1996).

[31] Id. at 759.

[32] Id.

this argument is not persuasive.

We affirm the grant of summary judgment and the denial of the motion for reconsideration.

Cox, J.

WE CONCUR:

Spearman, J.

Dwyer, C.J.