7-13-2016

Forbush v. Sagecrest Multi Family Appellant's Brief Dckt. 44053

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRAVIS FORBUSH and GRETCHEN HYMAS, individually and as a natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased), and BREANNA HALOWELL,

Plaintiffs-Appellants,

vs.

SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC., and JON KALSBEEK, individually and as President of the Sagecrest Multi Family Property Owners' Association,

Defendants-Respondents.

Supreme Court Case No. 44053

District Court No. CV-PI-2013-04325

APPELLANTS' BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County

Honorable Cheri C. Copsey Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

On November 10, 2012, at the Sagecrest apartment complex ("Sagecrest") in Meridian, Idaho, a gas-burning water heater emitted lethal levels of carbon monoxide ("CO"), poisoning teenagers McQuen Forbush and Breanna Halowell as they slept. No hard-wired CO detector was there to warn or protect them from the danger. Mr. Forbush was killed; Ms. Halowell survived but with a permanent brain injury.

Defendants/Respondents — The Sagecrest Multi Family Property Owners' Association, Inc. (the "POA") and POA President Jon Kalsbeek — knew for well over a year before this incident that the water heaters at Sagecrest posed a deadly threat (the air intakes were clogging, causing the water heaters to burn improperly and emit CO), and that professional preventative maintenance and hard-wired (as opposed to battery-powered) CO detectors were necessary solutions. The property manager at Sagecrest, First Rate Property Management, Inc. ("FRPM") wanted to take specific steps that would have saved Mr. Forbush and Ms. Halowell. But the POA (through Mr. Kalsbeek) — which had the power to hire, fire, and set FRPM's compensation for managing unit interiors, and routinely micromanaged FRPM's activities in unit interiors — prevented FRPM from taking its proposed actions. As a result, Mr. Forbush and Ms. Halowell were poisoned.

Plaintiffs/Appellants — Mr. Forbush's parents and Ms. Halowell — brought this action against Mr. Kalsbeek and the POA. The district court granted summary judgment, holding that neither Mr. Kalsbeek nor the POA owed any duties. Although normally a question of law, the

existence of a duty becomes a question of fact when it depends on disputed facts. The disputed facts here preclude summary judgment.

First, Mr. Kalsbeek and the POA owed **premises liability** duties. An entity with control over a premises owes duties proportionate to that control. Mr. Kalsbeek and the POA exercised control over whether: (a) hard-wired CO detectors would be timely installed; (b) a professional plumber would be hired to perform preventative maintenance; and (c) tenants and guests would receive adequate warnings of the deadly CO threat.

Second, Mr. Kalsbeek and the POA owed duties resulting from their **voluntary undertakings** to decide whether: (a) hard-wired CO detectors would be timely installed; (b) a professional plumber would be hired to perform preventative maintenance; and (c) tenants and guests would receive adequate warnings of the deadly CO threat. An additional element — reliance — is also necessary. FRPM relied on Mr. Kalsbeek and the POA's decisions.

Third, the POA is **vicariously liable** for FRPM's acts and omissions. The POA exerted control over whether: (a) hard-wired CO detectors would be timely installed; (b) a professional plumber would be hired to perform preventative maintenance; and (c) tenants and guests would receive adequate warnings of the deadly CO threat. FRPM was the POA's agent with respect to both unit exteriors and unit interiors at Sagecrest.

B. Course of the Proceedings

The district court initially denied summary judgment for the POA. R. p. 642. It then *sua sponte* gave notice of its intent to reconsider, R. p. 799, and subsequently granted summary

judgment, R. pp. 952-94, reasoning that the POA owed no duties, R. p. 977. The district court found that the POA lacked control over unit interiors, R. pp. 977-86, and did not voluntarily assume any duties, R. pp. 986-94. It applied the same reasoning and granted summary judgment to Mr. Kalsbeek.[1] Tr. p. 106, L. 18 to p. 112, L. 7; R. p. 949. Final judgment was entered, R. p. 996, and Plaintiffs timely appealed, R. pp. 1000-07.

C. Statement of the Facts

1. Mr. Kalsbeek and the POA exercised actual control over unit interiors.

Although Sagecrest unit owners exercised control over unit interiors, Mr. Kalsbeek and the POA also exercised parallel control over unit interiors. FRPM Owner Tony Drost testified that the POA, through Mr. Kalsbeek, controlled "global issues" at Sagecrest. R. p. 391 at Dep. p. 93, L. 14 to p. 95, L. 19. This control extended to unit interiors:

> A. . . . . Global issues consisted of the CO testing. Global issues consisted of the water heaters. Global issues consisted of leaks with windows, stairwells, light bulbs.
>
> * * * *
>
> Jon [Kalsbeek] was in control, and we did what he told us to do.
> Q. Who's responsible for the global issues?
> A. The POA through Jon.

R. p. 391 at Dep. p. 95, Ll. 9-19. Even replacing dishwashers — if it had to be done in multiple units — was a "global issue" for which FRPM needed Mr. Kalsbeek's "permission to go forward." R. p. 392 at Dep. p. 239, L. 20 to p. 240, L. 21; *see also* R. p. 394 at Dep. p. 318, L.

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[1] Plaintiffs voluntarily dismissed the other POA Board members. R. p. 646 at n.1.

13 to p. 320, L. 11; R. p. 397-98 (Mr. Kalsbeek "insisted that [Mr. Drost] run any global issue through [Mr. Kalsbeek]").

FRPM maintenance supervisor Sheila Thomason testified: "He [Mr. Kalsbeek] micromanaged things that I did on a daily basis . . . . I'd have to include him on the e-mails or report to him on daily things that happened." R. p. 403 at Dep. p. 66, Ll. 11-17; *see also* R. p. 410 at Dep. p. 259, Ll. 19-22 (Kalsbeek "micromanaged *everything* that we [FRPM] did" (emphasis added)). Mr. Kalsbeek made it clear that he was "in charge" of all "decisions that were made at Sagecrest." R. p. 409 at Dep. p. 219, L. 18 to p. 220, L. 12. For example, Mr. Kalsbeek required the on-site FRPM employees to keep a daily logbook of activities at Sagecrest, and complained when he found it insufficiently detailed. R. pp. 458, 486 (logbook included unit interior issues such as filter changes and CO testing).[2]

2. Mr. Kalsbeek and the POA's ability to micromanage FRPM is explained in part by the POA's power to hire, fire, and set FRPM's compensation for managing unit interiors.

Mr. Kalsbeek and the POA had financial leverage over FRPM. Sagecrest was FRPM's largest account — not merely at the time of this tragedy, but ever. R. pp. 929-30 at Dep. p. 69, L. 22 to p. 70, L. 25. Sagecrest constituted over twenty percent of the total units that FRPM managed. R. p. 141 at ¶ 14. FRPM was strongly motivated to keep the Sagecrest account.

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[2] The POA exercised control over unit interiors even prior to FRPM's management. The POA — not individual owners — paid FRPM's predecessor, H & H Property Management, Inc., to replace HVAC filters inside all Sagecrest apartments. R. p. 380 at Dep. p. 359, Ll. 8-22.

To keep its largest account, FRPM had to stay in the POA's good graces. Pursuant to Section 6.6A of the Covenants, Conditions and Restrictions of the Multi Family Portion of the Sagecrest Subdivision (Sagecrest's "CCR's"), all owners were required to use a property manager of the POA's choosing to manage unit interiors. R. p. 96.[3] Thus, the POA — *not* the owner, Mr. Switzer — decided whether FRPM would manage Unit 4624's interior.[4] The POA, through Mr. Kalsbeek, actively enforced § 6.6A. R. p. 388. The POA hired FRPM as its property manager on March 15, 2010. R. p. 98; R. p. 141 at ¶ 18. Thus, on the same day, FRPM became Mr. Switzer's property manager pursuant to § 6.6A. R. p. 104.

FRPM had two sources of compensation at Sagecrest: (1) a $150/month management fee paid by the POA, and (2) 5% of monthly gross rental receipts. R. p. 100 at ¶ 6.1; R. p. 111. The POA — not owners — set rental rates, and thus controlled monthly gross receipts. R. p. 106 at ¶ 5.3. Thus, the POA controlled FRPM's compensation for *all* management at Sagecrest, including management of unit interiors.

The POA paid FRPM's on-site employees' hourly wages. R. p. 100 at § 5.1. The POA, through Mr. Kalsbeek, had authority to grant or deny these employees' requests to work overtime — including on issues related to unit interiors. *See* R. p. 710. For example, Mr.

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[3] Section 6.6A included a "grandfather clause" allowing owners who managed their own units as of November 18, 2004 to continue doing so. R. p. 64 (handwritten notation: "Re-Record to add Section 6.6A per Sagecrest Property Owner's Association."); R. p. 96. Only four of the forty-eight buildings were grandfathered. *See* R. p. 141 at ¶ 18. Apartment 4624 was *not*. *See* R. p. 104.

[4] The POA Board had autonomous power to select the property manager. *See* R. p. 841 (Board vote replacing FRPM with Verity Property Management).

Kalsbeek directed FRPM leasing manager Tara Gaertner to compile a spreadsheet of units with hard-wired CO detectors. R. p. 708. Ms. Gaertner requested permission to work overtime to do so as quickly as possible. R. p. 709. Mr. Kalsbeek denied her request. R. p. 710.

Sagecrest was the biggest account FRPM ever had. To keep it, FRPM had to stay in the POA Board's good graces. Mr. Kalsbeek used that leverage over FRPM to micromanage FRPM's activities — including with respect to unit interiors.

3. The CCR's specifically grant the POA power to repair, maintain, and restore unit interiors, including through its agent, FRPM.

A defendant owes duties resulting from control over a premises or agent, regardless of whether that control was contractually authorized. *See infra* Parts III.A.1 and III.C.3. But, even if only authorized control could result in liability, the POA's control here was authorized.

The CCR's set forth the POA and owners' respective rights and responsibilities. The POA is responsible for maintaining unit exteriors and common areas. R. p. 68 at § 3.3(A). Owners are responsible for maintaining unit interiors, as well as exterior windows, doors, and air conditioning units. R. p. 69 at § 3.3(B). But, § 3.8 gives the POA Board the power to override this division:

> In the event the Owner of any Residential Lot improved with a Four Plex shall fail to maintain ***any portion*** of such Owner's Residential Lot that Owner is responsible to maintain, in a **manner reasonable [*sic*] *satisfactory to the Board*,** after approval by vote of at least sixty percent (60%) of the members of the Board present and voting and subject to such Owner's right to notice and a hearing before the Board, **the Association may, *through its agents* and employees, enter upon the Residential Lot or Four Plex and repair, maintain and restore the Residential Lot, or the Four Plex.**

R. p. 70 (emphasis added). Section 3.8 establishes that the POA had the contractual authority to repair, maintain, and restore unit interiors, including through its agent FRPM. Four things are noteworthy about § 3.8:

First, the substantive standard is "reasonabl[y] satisfactory to the Board"; the POA Board has absolute discretion to act pursuant to § 3.8.

Second, although the Board is *supposed* to follow procedures — a Board vote, notice, and a hearing before the Board — an owner has no recourse if the Board fails to do so.

Third, contrary to the district court's ruling below, § 3.8 applies to "any portion of such Owner's Residential Lot that Owner is responsible to maintain." (emphasis added) Section 3.8 does not limit the POA's power to unit exteriors (versus interiors).

Fourth, § 3.8 authorizes the POA to act "through its agents" — i.e. FRPM. *See also* R. p. 75 at § 6.7(A)(3) (POA may delegate powers to management company).

4. Mr. Kalsbeek and the POA were long aware of the deadly CO threat.

On July 19, 2011 — well over a year prior to the deadly poisoning — FRPM leasing manager Tara Gaertner called Mr. Kalsbeek and informed him that tenants in an apartment were exposed to such high levels of CO that, had they remained there for only another forty-five minutes, they would have died. R. pp. 670-71 (email re: phone call). In subsequent emails, Mr. Kalsbeek acknowledged the serious CO threat and its cause (water heaters clogging). R. pp. 673-676.

On July 28, 2011, FRPM maintenance supervisor Sheila Thomason forwarded to Mr. Kalsbeek a letter from Ben Davis of Express Plumbing, who had inspected the Sagecrest units (hereinafter the "Ben Davis Letter"). R. p. 698 ("I have also attached a word doc I received from Ben . . . ."); R. pp. 701-02 (letter). Mr. Davis sternly warned: "***I would strongly recommend that these [CO] issues be solved before any tenants suffer health problems or death.***" R. pp. 701-02 (emphasis added). Ms. Thomason's email extensively discussed the CO threat. R. pp. 696-99.

Mr. Kalsbeek acknowledged that by August of 2011 he was aware of "a serious potential health problem with carbon monoxide issues" at Sagecrest. R. p. 687 at Dep. p. 219, Ll. 10-15. He was also aware of the necessity of installing hard-wired CO detectors "in each unit" to prevent a tragedy. R. p. 383; *see also* R. p. 386 (email acknowledging need).

On October 10, 2012 — a month before this fatal poisoning — the Meridian Fire Department responded to a CO emergency involving Sagecrest tenant Molly Collins. R. p. 293. The next day, FRPM leasing manager Tara Gaertner informed Mr. Kalsbeek about the incident and repeated what he already knew: that battery-operated CO detectors were unreliable, and that only hard-wired CO detectors could avert a poisoning. R. p. 704.

5. Mr. Kalsbeek and the POA controlled hard-wired CO detector installation.

Mr. Kalsbeek, acting as POA President, established CO testing and detector-installation procedures for Sagecrest. FRPM general manager Lizz Loop was adamant that the Procedures were "Jon's way" — i.e. "the way Jon [Kalsbeek] wanted to have the testing and the maintenance done." R. p. 402 at Dep. p. 52, L. 24 to p. 53, L. 11. Ms. Gaertner explained that

Mr. Kalsbeek "came into town when we had that meeting and said, 'This [*sic*] is what the procedures are going to be.' He laid them out for us." R. p. 437 at Dep. p. 301, L. 18 to p. 302, L. 11. Even Mr. Kalsbeek acknowledged that the Procedures were his. R. p. 458 (he drove 1,600 miles to "correct" the Procedures).

Under Mr. Kalsbeek's Procedures, installation of hard-wired combination smoke/CO detectors was not scheduled to take place over any specific timeframe; rather, hard-wired CO detectors would be installed on a piecemeal basis during events such as a tenant turnover or an existing smoke detector's failure. R. p. 429 (March 20, 2012 Procedures); R. p. 829 (October 25, 2012 Procedures). Mr. Kalsbeek explained that under his Procedures owner approval was not required for hard-wired CO detector installation. R. p. 415 at Transcript p. 14, Ll. 2-18 ("There is absolutely nothing about owners' approval."); R. p. 418 at Transcript p. 98, L. 25 to p. 99, L. 1 ("[T]he smoke detector combo [i.e. combination smoke/CO detector] was not optional.").

Following the Molly Collins poisoning incident, the Meridian Fire Department warned FRPM that battery-powered CO detectors were inadequate. R. p. 704. The next day, FRPM leasing manager Tara Gaertner emailed Mr. Kalsbeek, pleading:

> **After yesterdays [*sic*] events I would like to have Chris [a handyman contractor] go into every unit and check and make sure the CO detectors that we installed are in working condition. The units that do not have CO detectors I would like him to install one. . . .** I would really like to do this to take the heat off us. I talked to Chris, he would charge $25 per building to make sure they are all good. If there is a unit that needs a CO detector it would be $55 for the detector and $25 for installing it. **Please let me know your thoughts.**

Id. Mr. Kalsbeek did not respond that the POA lacked the power to rule on this request. Rather, he stated: "**I will talk to the board and see how the board wants to proceed.**" R. p. 461 (emphasis added); *see also* R. pp. 148-49 at ¶ 69.

On October 15, 2012, Ms. Gaertner again stressed, "I don't think it should be optional to have Chris [the handyman contractor] go in and make sure every unit has a working CO detector." R. p. 705. Mr. Kalsbeek then requested a spreadsheet of which units had hard-wired CO detectors, R. p. 708, which Ms. Gaertner provided, R. p. 710 (covering email); R. pp. 713-16 (spreadsheet). During this extensive back-and-forth Mr. Kalsbeek never claimed that the POA lacked control over when hard-wired CO detectors would be installed.[5]

Mr. Kalsbeek then met with FRPM owner Tony Drost, FRPM general manager Lizz Loop, and FRPM leasing manager Gaertner on October 25, 2012. R. p. 149 at ¶¶ 70-71. He was aware that only sixty-four out of one-hundred-and-ninety-two units had hard-wired CO detectors. R. p. 415 at Transcript p. 13, L. 12 to p. 14, L. 2. Nonetheless, Mr. Kalsbeek stated that there was no need to deviate from his Procedures. R. p. 149 at ¶ 73; R. p. 416 at Transcript p. 17, Ll. 15-16. Ms. Loop explained that Mr. Kalsbeek's Procedures prevented the immediate installation of hard-wired CO detectors following the Molly Collins incident. R. p. 303-04 at Dep. p. 221, L. 9 to p. 222, L. 5. And so, by November 10, 2012, there was still no hard-wired CO detector in

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[5] On March 14, 2012 Ms. Gaertner drafted an email that clearly evidenced her desire to immediately install hard-wired CO detectors in all units. R. p. 442 ("I recommend putting CO combo detectors in every unit and be done with it."). Although Ms. Gaertner did not send this particular email to Mr. Kalsbeek, it is further evidence that FRPM would have carried through with this plan, but for Mr. Kalsbeek's Procedures to the contrary and insistence that his Procedures be followed.

Apartment 4624. *See* R. p. 715.[6] Mr. Kalsbeek's piecemeal installation Procedures directly contributed to Mr. Forbush's death and Ms. Halowell's brain injury.[7]

6. Mr. Kalsbeek and the POA controlled whether a professional plumber would be hired to perform preventative maintenance.

On April 15, 2011, FRPM maintenance supervisor Sheila Thomason emailed Mr. Kalsbeek, explaining that only a professional plumber would have sufficient training to perform effective preventative maintenance on the Sagecrest water heaters. R. p. 424. Mr. Kalsbeek objected to this life-saving precaution as too expensive. *Id.*

On April 18, 2011, Ms. Gaertner forwarded Mr. Kalsbeek the cost of professional maintenance. R. p. 427. Ms. Gaertner specifically asked Mr. Kalsbeek to decide whether to hire a professional: "Please let me know the next step. Do I schedule to have this done periodically, or as the problem arises?" *Id.* Mr. Kalsbeek did not respond that the POA lacked authority to make this decision. Instead, he replied: "Let us review this and get back to you next week." *Id.* But Mr. Kalsbeek and the POA never got back to her. As a result, the air intake on the unmaintained water heater in Apartment 4624 clogged, the water heater produced a deadly level of CO, and Mr. Forbush was killed and Ms. Halowell was severely injured.

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[6] FRPM provided a CO detector to Ms. Kipper (it was battery-powered), but it did not work. *See* R. p. 966.

[7] Hard-wired detectors could have been installed in a single day to prevent the disaster: on November 12, 2012 — two days too late — hard-wired CO detectors were installed in all remaining units. R. p. 376 at Dep. p. 278, Ll. 5-15; R. p. 376 at Dep. p. 278, Ll. 16-18.

7. Mr. Kalsbeek and the POA controlled whether owners and tenants would receive adequate warnings of the deadly CO threat.

On March 9, 2012, Mr. Kalsbeek instructed Ms. Gaertner not to send information regarding the deadly CO threat to owners or tenants. R. p. 448. A reasonable juror could conclude that, through this email, Mr. Kalsbeek[8] was asserting his right to control the flow of information about the CO threat to owners and tenants. Ms. Gartner confirmed this. R. p. 435 at Dep. p. 241, L. 23 to p. 242, L. 11.

Similarly, FRPM maintenance supervisor Sheila Thomason wanted to provide the Ben Davis Letter to all owners. Mr. Kalsbeek forbade her from doing so:

> THE WITNESS: I wanted to send the information [the Ben Davis letter] to every single owner at Sagecrest.
> Q. (BY MR. PALMER) Did you tell Jon that, Jon Kalsbeek?
> A. Yes, I did.
> * * * *
> Q. What was Jon's response when you said that you wanted to send [the letter] to every single owner?
> A. He said, "Absolutely not."
> Q. Did he say why? Did you ask him why?
> A. **He wanted to be the one in charge of distributing this type of information to the individual — individual owners at Sagecrest.**

R. p. 406 at Dep. p. 140, L. 1 to p. 141, L. 11 (emphasis added). The only thing preventing Ms. Thomason from distributing the Ben Davis Letter was Mr. Kalsbeek's command not to:

> Q. Was there anything that prevented you from sending it [the Ben Davis Letter] to the entire ownership?
> A. Jon [Kalsbeek] asked me not to.
> Q. Other than that, was there anything else that prevented you from sending it to the entire ownership?
> A. No.

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[8] Furthermore, use of "we" indicates that Mr. Kalsbeek was speaking for the POA.

R. p. 408 at Dep. p. 195, Ll. 8-14; *see also* R. p. 407 at Dep. p. 193, L. 15 to p. 194, L. 17 ("[Mr. Kalsbeek] wanted to review anything that I [Ms. Thomason] sent out to the owners . . . .").

A reasonable juror could conclude that Apartment 4624 owner Mr. Switzer would have taken action if he had seen Mr. Davis's stark warning: "***I would strongly recommend that these issues be solved before any tenants suffer health problems or death.***" R. p. 702 (emphasis added). Moreover, a reasonable juror could conclude that Apartment 4624 tenant Adra Kipper would have taken action if she had ever received an adequate warning about the CO threat.[9]

II. ISSUES PRESENTED

A. Do genuine issues of material fact preclude summary judgment on whether Mr. Kalsbeek and the POA owed premises liability duties?

B. Do genuine issues of material fact preclude summary judgment on whether Mr. Kalsbeek and the POA owed duties based on their voluntary undertakings?

C. Do genuine issues of material fact preclude summary judgment on whether the POA is vicariously liable for FRPM's acts and omissions?

D. Do genuine issues of material fact preclude summary judgment on whether Mr. Kalsbeek is liable for his own acts and omissions, even if undertaken in his capacity as POA President?

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[9] Ms. Kipper was informed that there was a potential CO issue by written notice that stated that her water heater would be replaced within the next week, without further notice of entry into her apartment. R. p. 239. Ms. Kipper reasonably assumed that this had been done and that the danger had been eliminated. R. p. 242 at Dep. p. 34, Ll. 6-15.

III. ARGUMENT

This Court recently summarized the standard of review:

> We review a district court's grant of summary judgment de novo, and apply the same standard used by the district court in ruling on the motion. Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). All reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party, and disputed facts are liberally construed in the nonmoving party's favor. If reasonable people could reach different conclusions or inferences from the evidence, summary judgment is inappropriate.

Houpt v. Wells Fargo Bank, Nat. Ass'n, 160 Idaho 181, 186, 370 P.3d 384, 389 (2016) (case citations omitted), *reh'g denied* (Mar. 10, 2016).

Although normally a question of law, the existence of a duty becomes a question of fact when it depends on disputed facts. *See Stoddart v. Pocatello Sch. Dist. # 25*, 149 Idaho 679, 686, 239 P.3d 784, 791 (2010) ("Normally, the foreseeability of a risk of harm, and thus whether a duty consequently attaches, is a question of fact reserved for the jury."); *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 402, 987 P.2d 300, 314 (1999) (questions of fact regarding whether defendant assumed a duty through a voluntary undertaking precluded summary judgment).

A. Genuine issues of material fact preclude summary judgment on whether Mr. Kalsbeek and the POA owed premises liability duties.

1. Premises liability duties depend on, and are proportional to, a defendant's *actual* control. Here, a reasonable juror could find that Mr. Kalsbeek and the POA actually controlled (a) hard-wired CO detector installation; (b) professional preventative maintenance; and (c) warnings to owners and tenants.

"[T]he general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises in repair." *Jones v. Starnes*, 150 Idaho 257, 261, 245 P.3d 1009, 1013 (2011) (quoting *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 713, 8 P.3d 1254, 1256 (Ct. App. 2000)).

The test is *actual* control. *Cook v. Bay Area Renaissance Festival of Largo, Inc.*, 164 So. 3d 120, 122 (Fla. Dist. Ct. App. 2015) ("In determining premises liability, the party's ability to exercise control over the premises is the relevant question; ownership of and title to the premises are irrelevant."); *ENGlobal U.S., Inc. v. Gatlin*, 449 S.W.3d 269, 277 (Tex. App. 2014) ("Control over the premises can be proven by a contractual agreement assigning a right of control *or by evidence of actual control*." (emphasis added)).

The POA actually exercised control over important aspects of unit interiors: (a) hard-wired CO detector installation; (b) professional preventative maintenance; and (c) warnings to owners and tenants.[10] It is no defense that the POA did not assert control over *all* aspects of unit interiors; the duty owed is proportional to the control exercised. *Johnson v. Steffen*, 685 N.E.2d 1117, 1119 (Ind. Ct. App. 1997) ("When a case involves a non-owner, liability turns upon the degree of control such person or entity exercises over the premises."); *La China v. Woodlands Operating Co., L.P.*, 417 S.W.3d 516, 522 (Tex. App. 2013) ("Duty in the context of premises liability is commensurate with the right of control." (citation and internal quotation marks

[10] To the extent there is doubt about who controlled the property and thus whether a duty existed, that doubt is for the jury to resolve. *See Nagel v. N. Ind. Pub. Serv. Co.*, 26 N.E.3d 30, 44 (Ind. Ct. App. 2015) ("[W]hether a duty exists in premises liability cases may depend upon resolution of underlying facts by the trier of fact, including questions regarding who controlled the property at the time and place of an accident.").

omitted)). Because Mr. Kalsbeek and the POA actually exercised control[11] over specific aspects of the property that caused the poisoning, they owed commensurate duties.

2. Even if *rightful* control were a prerequisite to premises liability duties, a reasonable juror could find that Mr. Kalsbeek and the POA had a right to control unit interiors.

Even if the test were *rightful* control, rather than *actual* control, summary judgment is still improper. CCR's § 3.8 gave the POA Board absolute discretion to deem an owner's maintenance of his or her property unsatisfactory. The POA could then enter upon the property and repair, maintain, or restore it, including through its agent, FRPM. Regardless of the usual division of responsibility, the POA could override that division at will.

The district court disregarded § 3.8, holding that it authorized the POA to make repairs to the few exterior areas — windows, doors, and air conditioning units — that owners normally were required to maintain. R. p. 980. This interpretation is incompatible with the plain text of § 3.8. *See supra* Part I.C.3. The district court improperly inserted the word "exterior" into § 3.8, despite the fact that the POA itself did not see fit to include that word. *See Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992) ("[C]ourts cannot revise the contract . . . .").

And, even assuming *arguendo* that § 3.8 was ambiguous, that merely creates fact questions for the jury. *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709,

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[11] Mr. Kalsbeek and the POA may argue that no premises liability duties exist absent *rightful* control. This is contrary to the law and suggests terrible public policy — a defendant should not be rewarded with impunity merely because its exercise of control was without proper authority. "Two wrongs don't make a right." *Fetterly v. Paskett*, 744 F. Supp. 966, 974 (D. Idaho 1990) (per Callister, J.).

720, 330 P.3d 1067, 1078 (2014) (interpretation of ambiguous contract is question of fact). The POA's construction of § 3.8 through its course of dealings — it did, in fact, exercise control over unit interiors — is powerful evidence that § 3.8 allowed such action. *Id.* at 721, 330 P.3d at 1079 ("A course of dealing is a pattern of conduct between the parties that may be used as evidence of how the parties intended the contract to be interpreted; it is evidence of the construction the parties placed on the language of the contract."); *see also City of Meridian v. Petra Inc.*, 154 Idaho 425, 439, 299 P.3d 232, 246 (2013). The POA cannot now disclaim the very authority it previously wielded.

3. It is irrelevant to Mr. Kalsbeek and the POA's liability that unit owner Matthew Switzer *also* owed, and *also* breached, premises liability duties.

A property owner's failure to discharge its duties does not excuse a non-owner with control over the property from discharging its parallel duties. *See Metsker v. Carefree/Scott Fetzer Co.*, 90 So. 3d 973, 977 (Fla. Dist. Ct. App. 2012) ("Two or more parties may share control over land or business premises. Under these circumstances, the fact that there may be joint responsibility or control over premises does not relieve a party from responsibility. . . . In addition, the fact that more than one person is under a duty and one fails to perform is no defense to one who has assumed control." (citations and internal quotation marks omitted)). Mr. Kalsbeek and the POA cannot defend on the grounds that owner Mr. Switzer *also* owed premises liability duties and *also* breached those duties.

B. Genuine issues of material fact preclude summary judgment on whether Mr. Kalsbeek and the POA owed duties resulting from voluntary undertakings.

1. A reasonable juror could find that Mr. Kalsbeek and the POA voluntarily undertook to decide whether: (a) hard-wired CO detectors would be timely installed; (b) a professional plumber would be hired to perform preventative maintenance; and (c) tenants and guests would receive adequate warnings of the deadly CO threat.

"A legal duty may arise if one voluntarily undertakes to perform an act, having no prior duty to do so. In such a case, the acting party has a duty to perform that act in a non-negligent manner." *Am. Bank v. BRN Dev., Inc.*, 159 Idaho 201, 207, 358 P.3d 762, 768 (2015) (alternations, internal quotation marks, and citations omitted). Although assumed duties frequently arise out of safety-related undertakings, any type of voluntary undertaking may result in an assumed duty. *See Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 688 n.5, 316 P.3d 92, 100 n.5 (2013) ("We do not intend to suggest that assumed duties exist only in the context of safety-related undertakings.").

The scope of an assumed duty is a question of fact. *See Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 402, 987 P.2d 300, 314 (1999) (questions of fact regarding whether defendant assumed a duty through a voluntary undertaking precluded summary judgment); *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 612, 873 P.2d 861, 866 (1994) ("[T]here is a genuine issue of material fact whether [defendant] undertook a voluntary duty . . . .").[12] As shown above, there is ample evidence that Mr. Kalsbeek and the POA voluntarily

[12] *See also Steele v. Maren Eng'g Corp.*, 460 F. Supp. 2d 877, 884 (S.D. Ind. 2005) ("Whether defendant has assumed a duty and the extent of the duty it assumed are usually questions of fact for the jury to determine."); *Resolution Trust Corp. v. Fleischer*, 890 F. Supp. 972, 981 (D. Kan. 1995) ("The precise scope of the duties [defendant] assumed necessarily

undertook to decide whether: (a) hard-wired CO detectors would be timely installed; (b) a professional plumber would be hired to perform preventative maintenance; and (c) tenants and guests would receive adequate warnings of the deadly CO threat.

2. A reasonable juror could find that FRPM relied on Mr. Kalsbeek and the POA to make these decisions.

Idaho requires reliance on an undertaking before a duty attaches. This may be reliance by *someone who would have otherwise prevented the harm* — as opposed to reliance by the injured person.[13] *See Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 352, 179 P.3d 309, 315 (2008).

In *Baccus*, Bechtel hired AmeriPride to place non-slip mats in the entries to Bechtel's work facility. *Id.* at 348, 179 P.3d at 311. The disputed facts allowed an inference that AmeriPride failed to place a mat in an entry. *Id.* at 348, 352-53, 179 P.3d at 311, 315-16. Baccus, a Bechtel worker, slipped in the entry and was injured. *Id.* at 348, 179 P.3d at 311. The opinion does not so much as hint that Baccus ever had any dealings with AmeriPride, knew that AmeriPride existed, or consciously relied on any entity to provide non-slip mats. Nonetheless, this Court reversed a grant of summary judgment for AmeriPride on the grounds that AmeriPride voluntarily assumed a duty. This Court emphasized that Bechtel relied on AmeriPride to provide

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involves a weighing of the facts, a task inappropriate for the court upon summary judgment."); *Smith v. State*, 921 P.2d 632, 634-35 (Alaska 1996) ("Where reasonable people could differ over the nature and extent of the act undertaken, summary judgment is inappropriate, since the scope of the assumed duty will vary depending on the inferences drawn from the facts."); *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1144 (Ind. 2006) ("Whether a party has assumed a duty and the extent of that duty, if any, are questions for the trier of fact.").

[13] The district court agreed that reliance by "[tenant Adra] Kipper, or even some other party" would suffice, but erroneously held there was no such evidence. R. p. 987.

the mats, noting that "[h]ad AmeriPride not agreed to place the mats at the entry, Bechtel likely would have found another company to fulfill that duty." *Id.* at 352, 179 P.3d at 315. Thus, "AmeriPride **induced Bechtel's reliance** on AmeriPride's promise to replace the safety mats, which increased the risk that a Bechtel employee such as plaintiff could slip, fall, and sustain injury were the promise not kept." *Id.* (emphasis added). The requisite reliance necessary for a voluntary-undertaking duty to attach may be reliance by someone who would have otherwise prevented the harm (rather than the person harmed).[14]

Here, a reasonable juror could find that FRPM was relying on Mr. Kalsbeek and the POA to decide whether: (a) hard-wired CO detectors would be timely installed; (b) a professional plumber would be hired to perform preventative maintenance; and (c) tenants and guests would receive adequate warnings of the deadly CO threat.

Control Inducing Reliance: The POA had the power to hire, fire, and set the compensation for FRPM's management for all of Sagecrest, including unit interiors. It controlled the hours that on-site FRPM employees worked, including on unit-interior issues. The POA — and specifically Mr. Kalsbeek — micromanaged FRPM's activities, including those affecting unit interiors. Thus, Mr. Kalsbeek and the POA created a dynamic where FRPM relied — and could not act without — Mr. Kalsbeek giving the POA's "ok."

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[14] This comports with the textbook example of a voluntary undertaking: attempting to rescue a drowning person. *See, e.g., Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 688, 316 P.3d 92, 100 (2013) (noting this paradigmatic example). Of course, the drowning swimmer is already in peril, and cannot change his or her conduct based on the would-be rescuer's attempt; however, *other potential rescuers* are likely to forbear upon seeing that a rescue is already underway.

Hard-Wired CO Detector Installation: Complying with Mr. Kalsbeek's assertion of control, FRPM leasing manager Tara Gaertner asked Mr. Kalsbeek for permission to immediately install hard-wired CO detectors in all units. Mr. Kalsbeek never said that he lacked the power to make this decision. Instead, he created written Procedures for piecemeal installation. He then re-affirmed his written Procedures after the Molly Collins poisoning incident. A reasonable juror could find that, if FRPM had not been relying on Mr. Kalsbeek's decision-making, it would have immediately installed hard-wired CO detectors in all units.

Professional Preventative Maintenance: FRPM maintenance supervisor Sheila Thomason informed Mr. Kalsbeek that a professional plumber should be hired to perform preventative maintenance on the Sagecrest water heaters. FRPM understood that it was necessary for the POA, and specifically Mr. Kalsbeek, to evaluate and authorize that course of action. Ms. Gaertner asked Mr. Kalsbeek whether to hire a professional plumber and provided follow-up expense information. Mr. Kalsbeek never said that he lacked the power to make this decision. Instead, he delayed making any decision until it was too late. A reasonable juror could find that, if FRPM had not been relying on Mr. Kalsbeek's decision-making, it would have hired a professional plumber to perform preventative maintenance.

Warnings: Mr. Kalsbeek ordered Ms. Thomason not to share the Ben Davis Letter with owners. The only reason that Ms. Thomason did not send this dire letter is that she relied on Mr. Kalsbeek to make that decision. Mr. Kalsbeek also asserted control over Ms. Gaertner's warning attempts. A reasonable juror could find that, if FRPM had not been relying on Mr. Kalsbeek's decision-making, it would have provided adequate warnings to owners and tenants.

In *Baccus*, had AmeriPride not agreed to place mats in entryways, Bechtel would have hired a different contractor to do the work, thereby preventing Baccus's injuries. Similarly here, had Mr. Kalsbeek and the POA not asserted decision-making authority over hard-wired CO detector installation, professional preventative maintenance, and warnings, then FRPM would have taken specific proposed actions that would have prevented Mr. Forbush's death and Ms. Halowell's injuries.

C. Genuine issues of material fact preclude summary judgment on whether the POA is vicariously liable for FRPM's acts and omissions.

1. A reasonable juror could find that FRPM was the POA's agent with respect to: (a) installing hard-wired CO detectors; (b) hiring a professional plumber to perform preventative maintenance; and (c) providing warnings to owners and tenants.

"A principal is liable for the torts of an agent committed within the scope of the agency relationship." *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 303, 796 P.2d 506, 512 (1990); *see also Navo v. Bingham Mem'l Hosp.*, No. 42540, 2016 WL 1638245, at *13 (Idaho Apr. 26, 2016), *reh'g denied* (June 9, 2016) ("One consequence of an agency relationship is that the principal becomes liable for the torts committed by the agent within the scope of agency.").

The existence and scope of an agency relationship is a question of fact. *See Agrisource, Inc. v. Johnson*, 156 Idaho 903, 909, 332 P.3d 815, 821 (2014) ("Agency is generally a fact question for the jury when the evidence discloses corroborative facts."); *Clark v. Tarr*, 76 Idaho 383, 391, 283 P.2d 942, 947 (1955) ("[T]he nature and extent of the authority of an agent and whether the act or contract in controversy was within the scope of his authority are, under the evidence, questions of fact to be determined by the jury or other trier of facts . . . .").

"[A]gency may be proven by circumstances and course of dealing between the parties" and "the relationship of the parties to each other and to the subject matter." *Adkison Corp. v. Am. Bldg. Co.*, 107 Idaho 406, 409, 690 P.2d 341, 344 (1984). The POA had the power to hire, fire, and set FRPM's compensation with respect to unit interiors. Mr. Kalsbeek and the POA actually exercised control over FRPM's acts and omissions with respect to hard-wired CO detector installation, professional preventative maintenance, and warnings. Thus, at least with respect to those issues, FRPM was the POA's agent.

2. It is no defense that the POA and individual owners had concurrent, overlapping control over FRPM.

A single agent may serve two or more principals, even with respect to the same transaction. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1250 (10th Cir. 2013) ("An agent can serve multiple principals at once . . . ."); *Wallulis v. Dymowski*, 918 P.2d 755, 764 (Or. 1996) ("[A]n agent can serve two principals."); *C&R Forestry, Inc. v. Consol. Human Res., AZ, Inc.*, No. 05-cv-381, 2007 WL 914198, at*4 (D. Idaho Mar. 23, 2007) (allegations and evidence that agent served defendant X did not foreclose possibility that agent also served defendant Y, because "a person may be the agent of multiple principals"); *see also* Restatement (Second) of Agency § 226 (1958) ("A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.") (cited with approval by Judge Lodge in *C&R Forestry*, *supra*); Restatement (Third) Of Agency § 3.16 (2006); *see also* Restatement (Third) Of Agency § 7.03 cmt. d (2006) ("An agent who commits a tort may have more than one principal . . . .").

That owner Mr. Switzer could also direct FRPM's activities in his units does not absolve the POA of liability. The POA exercised control over FRPM's activities and prevented FRPM from taking specific actions that would have saved Mr. Forbush and Ms. Halowell from harm.

3. A principal-agent relationship depends on the entities' *actual* relationship.

The POA may argue that it had no contractual right to control FRPM's activities in unit interiors. The governing test is the control that the principal actually exercises *in real life*, not the control that the principal supposedly is entitled to exercise *on paper*. *See Barefoot v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 424 F.2d 1001, 1004-05 (10th Cir. 1970) ("An agency relationship may, of course, be established through actual conduct of the parties and regardless of written or other specific authority negativing or limiting the existence or extent of an agency."); *In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d 56, 74 (S.D.N.Y. 2009) ("[B]ecause agency is determined according to extant factual circumstances, a contractual disclaimer or acknowledgement of agency is not dispositive for purposes of determining whether an agency relationship exists as a matter of law."); *Tomlinson v. G.E. Capital Dealer Distrib. Fin., Inc.*, 624 So. 2d 565, 567 (Ala. 1993) ("[T]erms of a contract disavowing any agency relationship between the parties to a contract will not conclusively establish the absence of control."); *Hylton v. Koontz*, 636, 532 S.E.2d 252, 257 (N.C. Ct. App. 2000) ("It is not dispositive that a contract denies the existence of an agency relationship, if in fact the relationship was that of agent-principal."); *Thornton v. Ford Motor Co.*, 297 P.3d 413, 419

(Okla. Civ. App. 2012) ("If the facts show actual control by the principal, an agency is established regardless of the contract language.").

A contrary ruling would yield unjust results. A principal that wanted to avoid tort liability for its agent's acts and omissions could simply limit the agent's authority by contract. The principal could then disregard the contract, and insist on exerting a broader scope of control over the agent. If the agent refused, the principal could simply fire the agent and hire one willing to abide by the *de facto* scope of the agency relationship. Such was the case here. Regardless of whether the POA had the right to direct FRPM's activities in unit interiors pursuant to CCR's § 3.8 — although this was the case — the POA could remove FRPM *as the manger of unit interiors* if FRPM disobeyed the POA's directions regarding unit interiors. This would deprive FRPM of its largest account ever. The POA leveraged its power over FRPM and did, in fact, exercise control over FRPM's acts and omissions regarding hard-wired CO detector installation, professional preventative maintenance, and warnings. That control existed regardless of any attempted disclaimer in the CCR's.

D. Genuine issues of material fact preclude summary judgment on whether Mr. Kalsbeek is liable for his own acts and omissions — regardless of capacity.

Mr. Kalsbeek may contend that he cannot be held individually liable because he was acting as the POA president.[15] Any such argument is contrary to Idaho law.

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[15] The district court did not grant summary judgment on this basis.

1. Corporate officers and directors are liable for their own acts and omissions.

That a corporate officer or director committed a tort while acting within the scope of his or her duties is no defense. *See VFP VC v. Dakota Co.*, 141 Idaho 326, 334, 109 P.3d 714, 722 (2005) (approving of jury instruction stating: "to be held liable a corporate director must specifically direct, actively participate in, or knowingly acquiesce in the fraud or other wrongdoing of the corporation or its officers"), *abrogated on other grounds by Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 591, 329 P.3d 368, 373 (2014) (abrogating only *VFP*'s suggestion that a jury may decide the equitable issue of veil piercing); *Eliopulos v. Knox*, 123 Idaho 400, 404-05, 848 P.2d 984, 988-89 (Ct. App. 1992) ("A director who personally participates in a tort is personally liable to the victim, even though the corporation might also be vicariously liable. . . . 'Participation' may be found on the basis of direct action, but also may consist of knowing approval or ratification of the unlawful acts of others."); *see also L.B. Indus., Inc. v. Smith*, 817 F.2d 69, 71 (9th Cir. 1987).[16] "Whether defendant approved of, directed, actively participated in, or cooperated in the negligent conduct is a question of fact for the jury." *Hoang v. Arbess*, 80 P.3d 863, 868 (Colo. Ct. App. 2003). There is ample evidence of Mr. Kalsbeek's active participation for a jury to hold him liable.

2. Idaho Code § 30-30-406 is inapposite.

Mr. Kalsbeek may argue that he is absolutely immune under I.C. § 30-30-406 (codified as I.C. § 30-3-39 at the time of the briefing below), which provides: "A member of a corporation

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[16] This principle applies equally to nonprofit and for-profit corporations. *See Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1144 (4th Cir. 1975).

is not, as such, personally liable for the acts, debts, liabilities or obligations of the corporation." But the statute plainly protects members from *vicarious* liability for the acts "*of the corporation*"; not *direct* liability for *their own* torts. Moreover, this Court "will not interpret a statute as abrogating the common law unless it is evident that was the Legislature's intent." *Pioneer Irr. Dist. v. City of Caldwell*, 153 Idaho 593, 601-02, 288 P.3d 810, 818-19 (2012). Section 406 evinces no intent to abrogate the common law discussed in Part III.D.1 above.

Finally, twisting § 30-30-406 to provide absolute immunity in this context would have dangerous consequences, "enable[ing] a director or officer of a corporation to perpetrate flagrant injuries and escape liability behind the shield of his representative character, even though the corporation might be insolvent or irresponsible." *Ben-Yishay v. Mastercraft Dev., LLC*, 553 F. Supp. 2d 1360, 1369 (S.D. Fla. 2008).

3. An I.C. § 30-30-623 affirmative defense cannot be resolved on summary judgment.

Mr. Kalsbeek may argue that he is immune under I.C. § 30-30-623 (codified as I.C. § 30-3-85 at the time of the briefing below). Section 623 provides in pertinent part:

> (1) An officer with discretionary authority shall discharge his duties under that authority:
>
> (a) In good faith;
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (c) In a manner the officer reasonably believes to be in the best interests of the corporation and its members, if any.
>
> * * * *
>
> (4) An officer is not liable to the corporation, any member, or other person for any action taken or not taken as an officer, if the officer acted in compliance with this section.

Section 623 has three elements: the defendant must have acted (1) in good faith; (2) with the care of an ordinarily prudent person in a like position under similar circumstances; and (3) in a manner the defendant reasonably believed to be in the best interests of the corporation and its members. Any § 623 argument fails here:

First, Mr. Kalsbeek did not meet his burden of establishing that he was entitled to summary judgment as a matter of law. Mr. Kalsbeek presented an affidavit that parroted § 623's elements *verbatim*, rather than setting forth evidentiary facts proving that he actually acted in good faith, prudently, and under the belief that his actions were in the best interests of the POA and its members. R. pp. 530-32 at ¶¶ 10-12. When a defendant moves for summary judgment based on an affirmative defense, the defendant must offer evidence proving each element of that defense. *See Chandler v. Hayden*, 147 Idaho 765, 771, 215 P.3d 485, 491 (2009).

Conclusory statements are *not* admissible evidence. *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 917, 188 P.3d 854, 859 (2008). A summary judgment affidavit must set forth evidentiary facts — i.e. "information as to what took place, an act, an incident, a reality" — rather than unsubstantiated "ultimate facts" or "legal conclusions." *Ainsworth v. Progressive Cas. Ins. Co.*, 322 P.3d 6, 11 (Wash. Ct. App. 2014). Moreover, in order to be admissible, lay opinion testimony must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." I.R.E. 701. Lay witness testimony that merely tells the jury what result to reach is

inadmissible. *See, e.g.*, *State v. Davis*, 155 P.3d 909, 915 (Utah Ct. App. 2007) (reversing; trial court erred by allowing witness to testify in a manner that parroted elements of crime).

Mr. Kalsbeek cannot establish that he is entitled to summary judgment merely by copying the elements of an immunity statute and pasting them into an affidavit. *See Hall v. Bean*, 416 S.W.3d 490 (Tex. App. 2013). In *Hall*, homeowners sued HOA officers for breach of fiduciary duty. The officers moved for summary judgment, relying on affidavits that stated:

> All decisions I made as an officer were made in good faith, and I exercised ordinary care and sought the input of other board members before making my decisions that are being challenged in this litigation. I believe that all the decisions I have made as an officer were in the best interests of the Association.

Id. at 494. The district court granted summary judgment. The appellate court reversed, holding: "None of the affidavits provide any underlying facts to support the assertions in this paragraph, and therefore the statements are merely conclusory. Because conclusory statements in an affidavit are not competent summary-judgment evidence, the officers failed to establish that they were entitled to judgment as a matter of law." *Id.* As in *Hall*, Mr. Kalsbeek's cut-and-paste affidavit is inadmissible and insufficient to establish that he is entitled to summary judgment.

Second, even if Mr. Kalsbeek's affidavit was sufficient to create a prima facie case for summary judgment, the record is replete with conflicting facts for the jury to resolve. "[S]ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles." *Ashman v. Barrows*, 438 F.3d 781, 784 (7th Cir. 2006) (quoting *McGreal v. Ostrov*, 368 F.3d 657, 677 (7th Cir. 2004)).

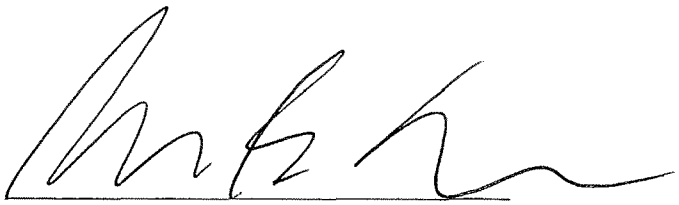
Here, § 623's first and third elements depend on Mr. Kalsbeek's subjective good faith and beliefs.

Considering the evidence in the light most favorable to the Plaintiffs, a reasonable juror easily could find that by preventing FRPM from carrying through with its proposed plans to immediately install hard-wired CO detectors in all units, to hire a professional plumber to preform preventative maintenance, and to provide adequate warnings to owners and tenants, Mr. Kalsbeek was not acting in good faith, prudently, and in the best interests of the POA and its members. These are issues for the jury to decide.

IV. CONCLUSION

The district court wrongly held that Mr. Kalsbeek and the POA owed no duties. It based this ruling on erroneous findings that were contrary to voluminous disputed facts. A reasonable juror could find the facts necessary to impose duties on Mr. Kalsbeek and the POA under premises liability, voluntary undertakings, and agency theories. Plaintiffs respectfully request that this Court reverse the summary judgments, and remand to allow a jury to resolve the disputed facts.

Dated this 7th day of July, 2016.



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