8-23-2016

Forbush v. Sagecrest Multi Family Respondent's Brief 2 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

RESPONDENT SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC.S' BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Cheri C. Copsey Presiding

Michael J. Elia
Craig D. Stacey
Moore & Elia, LLP
PO Box 6756
Boise, ID 83707
Attorneys for Sagecrest Multi Family Property Owners' Association, Inc.

Charles F. Peterson, Jr.
PETERSON LAWYERS
chuck@petersonlawyers.com
913 W. River Street, Ste. 400
Boise, ID 83702
Attorneys for Plaintiffs-Appellants

John M. Howell
BARNUM HOWELL, PLLC
380 S. 4th Street, Suite 104
PO Box 2616
Boise, ID 83701-2616
Attorney for Jon Kalsbeek

G. Bryan Ulmer
Tyson E. Logan
Michael F. Lutz
THE SPENCE LAW FIRM
PO Box 548
15 S. Jackson St.
Jackson, WY 83001
Attorneys for Plaintiffs-Appellants

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I. STATEMENT OF THE CASE

This appeal is brought by Plaintiffs-Appellants against the property owner's association at an apartment complex for a condition of the interior of one of the units (a water heater) occupied by tenant Adra Kipper. Private First Class McQuen Forbush and Breanna Halowell were guests of Ms. Kipper in her apartment at the Sagecrest Apartment Complex on November 9 and 10, 2012. On the night of November 10, 2012, the water heater in Ms. Kipper's apartment emitted carbon monoxide into the apartment. Both Ms. Halowell and PFC Forbush were exposed to high levels of carbon monoxide and PFC Forbush died as a result.

At its core, this appeal is regarding the control of the interior of an apartment on a residential lot at the Sagecrest complex for which the property owner's association (POA) had no authority to maintain. A property owners' association generally has the duty to the members of the common-interest community to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control. *See Restatement (Third) of Property (Servitudes) § 6.13 (2000)* (*emphasis added*). Plaintiffs have conceded this point. (*R. p. 802; P's Supp brief Re: POA Motion for Summary Judgment*) ("Such a course of conduct may be highly unusual for an owners' association which *typically* neither has nor exercises control over how a property was managed within the interior walls of an apartment..."). In this case, there are no duties under the Conditions, Covenants, & Restrictions (CCRs) that are out of the ordinary, nor is there a special relationship or assumed duties to the guests of the tenant that changed the POA's general duties.

Plaintiffs initially sued INTERMOUNTAIN GAS, AO SMITH (the manufacturer of the water heater), multiple HVAC companies that either installed or performed services on the water heaters at the complex, SAGECREST DEVELOPMENT, LLC (the property developer), MATTHEW E. SWITZER, TRUST (the owner of the apartment building), FIRST RATE PROPERTY MANAGEMENT, INC. (the property management company), TONY DROST (First Rate president), SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC. (SMPOA), and individual board members of the SMPOA, JON KALSBEEK, JAY ARLA, CHRIS SCHWAB, & DAVID MEISNER. Noticeably absent from the list of defendants is Adra Kipper, the tenant of #4624, who had actual control of the premises.

Plaintiffs brought claims of negligence, vicarious liability for the negligence of FRPM (property manager), and intentional infliction of emotional harm against the SMPOA. The Plaintiffs amended their Complaint four times and the allegations against these Defendants remained the same. Plaintiffs alleged that SMPOA and Mr. Kalsbeek were negligent in the following manner:

> a. Failure to exercise reasonable care under all of the circumstances;
>
> b. Failure to provide and/or maintain the apartment in a safe and sanitary condition fit for human habitation;
>
> c. Failure to provide and/or maintain the apartment's water heater, air handler, and heating system in a reasonably safe condition;
>
> d. Failure to perform a reasonable inspection of the apartment – including a reasonable inspection of the apartment's water heater, air handler and ventilation system after determining the water heater was leaking carbon monoxide;
>
> e. Failure to test or confirm the carbon monoxide detectors were installed properly and working after delivering carbon monoxide detectors to apartment 4624; and,

f. Failure to adequately warn of the unreasonably dangerous condition in apartment 4624.

(*Id. pp. 612-613*).[1] Regardless, the alleged duties are all duties owed to a tenant solely by the owner of the unit and/or the owner's agent; not a property owner's association that manages common areas of a complex.

SMPOA filed a Motion for Summary Judgment which was denied by the District Court. After several additional Motions for Summary Judgment by co-defendants, Presiding Judge Copsey, sua sponte, set a hearing to reconsider SMPOA's summary judgment motion. The Court granted the motion for reconsideration, holding that SMPOA did not have a duty, nor did it assume a duty, to plaintiffs as guests of a tenant. (*R., p. 977*). The Court further held that SMPOA did not have any authority/duty through its own CCRs, or any contractual agreement, to replace or maintain the water heater inside the interior of the apartment. (*Id.*) FRPM's and Switzer's motions for summary judgment were denied by the Court, and the lawsuit against them was resolved between the parties and dismissed. (*Aug., p. 101-106*)

This appeal is brought against SMPOA and one of its board members, Jon Kalsbeek. SMPOA had no authority to maintain the interior of the unit in which this incident occurred. The Sagecrest Apartment complex, located at 1805 E. Overland Rd., Ste. 58, Meridian, in Ada County, Idaho, includes 48 residential lots each containing a separate building which has four apartments. The residential lots are owned by individuals or entities, and each owner is a shareholder and member of the SMPOA.

[1] Absent are allegations of any premises liability duties or assumed duties by these defendants.

When this complex was created, the development company, Sagecrest Development, LLC, recorded the Declaration of Covenants, Conditions and Restrictions (CCRs). (*R., p. 64-96*). SMPOA is incorporated as a non-profit corporation and its Articles of Incorporation describe its purposes and powers to "provide for maintenance, preservation and architectural control of those certain lots as established in the Declaration of Covenants, Conditions, and Restrictions of Sagecrest Subdivision … and to promote the health, safety, and welfare of the residents within the subdivision…" (*R. p. 60-61, ¶6*).

The CCRs set forth that the residential lots are owned and maintained by the individual owners, and the common areas are owned and maintained by SMPOA. These "common areas" include: "All real property, fixtures, personal property and improvements owned, leased or otherwise held now or in the future by the Association exclusively for the common use and enjoyment of the Owners…" (*R. p. 66*). Consistent with its authority, SMPOA has the duty to maintain the common areas. (*R. p. 68, ¶3.3.A*). In addition to these duties, SMPOA has the duty to maintain certain parts of the exterior of the four plexes including the siding, structural portions, street lamps, entry ways, exterior stairs, railings, decks, and roofs. (*Id.*) In order to maintain these exterior portions of the four plexes, SMPOA has an easement for access. (*R. p. 69, ¶3.6*). The interiors of the units are exclusively controlled by the owner of the four plex. (*R. p. 69, ¶3.5*). SMPOA is not granted any authority in regard to the interiors of the four plexes, nor do they have an easement to access the interiors.

Each owner holds fee simple title to these residential lots, which are where the four plexes are located. (*R. p. 67*). The CCRs set forth that the owners "have the

exclusive right to paint, repair, tile, wash, paper or otherwise maintain, refinish and decorate the interior portions of their four plex..." (*R. p. 69, ¶3.5*). The owners also have the duty to maintain "[t]he entire interior of the four plexes, including but not limited to flooring, ceilings, walls and wall coverings, appliances, plumbing and plumbing fixtures, electrical system and fixtures, all interior components of the heating and air conditioning system." (*R. p. 69, ¶3.3.B*) (*emphasis added*).

SMPOA contracted with a property manager, First Rate Property Management ("FRPM"), to performed day-to-day administrative duties on behalf of SMPOA for the common areas. (*R. p. 98-102; p. 141*). FRPM also had separate, individual contracts with the four plex owners, including the owner of unit #4624 the Mathew E. Switzer, Trust ("Switzer"), to manage their residential lots. (*R. p. 104-113; p. 141*). The "PREMISES", as stated in the Switzer-FRPM agreement, is the property located at 1805 E. Overland. Bldg. 46 #11, #12, #23, and #24.

FRPM had sole authority to lease out Mr. Switzer's unit, contract for services on his behalf, and contract for all ordinary repairs and replacements reasonably necessary to preserve and maintain his premises in an attractive condition and in good state of repair. (*R. p. 104-113, ¶2.5, ¶9.1, ¶9.4*). FRPM also had power of attorney to manage repairs, alterations, and improvements, and to pay for such services on Mr. Switzer's behalf. (*Id., ¶19.2*). FRPM was additionally granted authority to make any repairs it deemed necessary without authorization from the owner up to an amount of $250.00. (*R., p. 108; FRPM-Switzer Agreement, ¶9.5; R. p. 788*) (*emphasis added*)[2]. This lawsuit is brought

[2] In return for these and other services, First Rate was paid 5% of the total monthly gross receipts from the owners to manage their residential lots. (*Id., ¶16.1*). SMPOA paid

due to the harm that occurred inside unit #4624.

Adra Kipper leased unit #4624 in April of 2011 from FRPM, and then renewed her lease agreement for another year in March of 2012. (*R. p. 187-199*). Plaintiff Breanna Halowell and Adra Kipper were friends, and Ms. Halowell had stayed at Ms. Kipper's apartment many times in the past.

II. ATTORNEY FEES ON APPEAL

The Defendants should be awarded their attorney fees and costs on appeal pursuant to Idaho Appellate Rules 41, Idaho Rule of Civil Procedure ¶54, and Idaho Code §12-121.

Attorney fees and costs on appeal are appropriate under I.C. § 12-121, I.R.C.P. 54(e)(1), and I.A.R. 41, only if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. *Stanley v. McDaniel*, 134 Idaho 630, 633 (2000). Where an appeal turns on questions of law, an award of attorney fees under this section is proper if the law is well settled and the appellant has made no substantial showing that the district court misapplied the law. *Id.*; *see also Stiles v. Amundson*, 2016 WL 3679909, at *4 (2016) (Arguments must be well-reasoned and have at least some precedential support.) Plaintiffs have not pointed to any misapplication of the law by the district court. Further, Plaintiffs are asking the Court to change well-established law and create an exception to established premises liability law to hold a property owners' association liable for property that it has no authority to control.

FRPM $150.00 per month to manage the common areas of the complex. (*R., p. 100, ¶6.0*).

Plaintiffs have also brought this appeal frivolously, unreasonably, and without foundation because they have raised new issues that are not proper for appeal. *Turner v. Cold Springs Canyon Ltd. P'ship*, 143 Idaho 227, 230 (2006). The issue of premises liability was not addressed by the District Court in its *Order Re: Motions for Reconsideration of Sagecrest POA and Switzer Summary Judgment Decisions*. Further, at the District Court, Plaintiffs argued that the tenant, Adra Kipper, relied on SMPOA's assumed duties created by voluntary acts. Plaintiffs now have taken the position that SMPOA assumed duties for which FRPM relied upon. This is a different argument not addressed by the District Court.

III. ARGUMENT

Standard of Review

When the Idaho Supreme Court reviews a grant of summary judgment, it does so under the same standard employed by the District Court. *Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774, 779, 215 P.3d 494, 499 (2009). Summary judgment is proper "if 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 judgment as a matter of law." *Id.* (*quoting* Idaho R. Civ. P. 56(c)).

When a motion for summary judgment has been properly supported with evidence indicating the absence of material fact issues, the opposing party's case must not rest on mere speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991); *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). The question is whether a genuine issue of fact exists and whether the moving party is entitled to

judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

INTRODUCTION

In this appeal, Plaintiffs allege that SMPOA and Mr. Kalsbeek owed premises liability duties, assumed duties based on voluntary undertakings, and are vicariously liable for FRPM's acts and omissions. Plaintiffs are also alleging that Mr. Kalsbeek is liable for his own acts and omissions. (*Apps.' Brief, p. 14*).

Despite amending their Complaint four times, Plaintiffs did not allege Defendants owed them a premises liability duty or assumed a duty from voluntary undertakings. Regardless, these new claims fail due to well-known Idaho legal principles:

(1) Defendants cannot be held liable under premises liability law because, as the property owner's association, they did not control the residential lot and the interior of its units. *See McDevitt v. Sportsman's Warehouse, Inc.*, 151 Idaho 280, 285 (2011) (The general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises in repair) (citing *Heath v. Honker's Mini–Mart, Inc.*, 134 Idaho 711, 714–15 (Ct.App.2000);

(2) Defendants cannot be liable for an assumption of a duty because they did not direct any maintenance or perform any maintenance on the interior of residential unit #4624 and neither the owner nor the tenant relied on SMPOA for any maintenance. *See Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 688 (2013) (Liability for an assumed duty can only come into being to the extent that there is in fact an undertaking...When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to

the duty actually assumed); *see also Gagnon v. W. Bldg. Maint., Inc.*, 155 Idaho 112, 115 (2013) (Reliance on the duty is a required element of a claim by third parties.);

(3) Defendants cannot be vicariously liable for the acts or omissions of FRPM because FRPM was not SMPOA's agent as to the interior of unit #4624; FRPM was Switzer's agent for his residential lots and the interior of unit #4624. *See Adams v. Krueger*, 124 Idaho 74, 76 (1993) (The historical and economic genesis of the doctrine of respondeat superior, or vicarious liability, lies in the fact that the tort is brought about in the course of an undertaking for the benefit of the master, and that the master possesses the right to control the servant's course of conduct as well as the result to be accomplished through such conduct.).

A. Rebuttal of Plaintiffs' Statement of Facts

SMPOA's CCR's and the contractual agreements between FRPM and SMPOA, and FRPM and Switzer, unmistakably set forth that Switzer owned the unit and delegated authority to control the interior of the unit to FRPM. No other party had any authority with regard to the interior of the unit.

Plaintiffs claim that SMPOA and Mr. Kalsbeek exercised actual control over unit interiors, mainly in reliance on the testimony of FRPM employees and the owner, Tony Drost. (*Apps.' Brief, p. 3*). Mr. Drost's testimony was in direct contrast to FRPM's agreement with Switzer and was a veiled attempt to conceal its own failing in regard to its duties at the complex leading up to the November 10, 2012 incident. (*See R. p. 984, Memo Re: Order on Motions to Reconsider*) (Judge Copsey stated, "In an attempt to avoid its responsibilities, First Rate tries to argue that Sagecrest POA modified ¶3.4…")

In the event that FRPM employees were under the erroneous belief that SMPOA had the ability to control the interiors of the units, their misunderstanding and alleged reliance on SMPOA is a failure to perform their duties as an agent of the owners. FRPM's failure cannot create a duty for SMPOA to the owners and tenants at the complex.

An email conversation between Tony Drost and Jon Kalsbeek, in August of 2011, illuminated the fact that FRPM was in control of the interiors of the units as an agent for the owners. (*R., p. 786*). In this conversation Tony Drost and Jon Kalsbeek discussed the water heater situation at Sagecrest. Mr. Kalsbeek stated, "the water heaters are interior items of each unit and is therefore an owners' choice on how to handle this situation, not the POA. This makes the cost for inspections and evaluations as owner may request, owner responsibility." (*R., p. 786*). Mr. Drost replied, "Everyone understands that. As you have requested, FRPM is keeping the POA informed of any major issues happening within the complex." (*Id.*)

Consistently, when water heaters tested high for carbon monoxide, FRPM contacted the owner of the unit, not SMPOA. (*R., p. 691-94, e.g.* July 29, 2011 email from Sheila Thomason to various owners "Please let me know which building you own and if I have approval to replace your water heater(s) listed.").

Plaintiffs also claim that SMPOA and Mr. Kalsbeek had financial leverage over FRPM because they hired and could fire them. (*App.'s Brief, p. 4-5*). This argument is completely irrelevant to the issues of control of the interiors of the units. Switzer had a contract with FRPM to manage his unit #4624. Switzer granted authority to FRPM over his residential lot and, as a non-party to the contract, the SMPOA Board could not alter

this agreement in any way.

The only manner in which FRPM could lose its contracts with the owners was for a meeting to be called with all of the owners at the complex (a SMPOA meeting) and 75% of the owners would have to vote to remove and replace the property management company. (*R., p. 96, ¶6.6A*). Therefore, if the individual owners were content with FRPM's performance managing their residential lots, FRPM would remain the property owner's agent.

Plaintiffs further claim that ¶3.8 of the CCRs grants SMPOA power to override an owner's rights to their residential lots to repair, maintain, and restore unit interiors, including through its agent, FRPM. (*Apps.' Brief, p. 6*). The only situation where SMPOA has the ability to force performance of maintenance on an owner's residential lot is when "the Owner...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." (*R. p. 70., ¶3.8*) (*emphasis original*). In order for SMPOA Board to take action, after the owner fails to do so, it must vote on contemplated action and then give the Owner notice and a hearing before the Board. (*Id.*) (*emphasis added*). This is in regard to the exterior of the units. *See Order Re: Motions to Reconsider* (*R., p. 980*). If an owner allowed the exterior of the units on his residential lot to deteriorate, the dilapidated exterior could materially affect the other owners' property on the complex. In such an instance, the CCRs granted the SMPOA Board authority to vote and provide a hearing to deal with that potential property value issue. Nothing in ¶ 3.8 grants SMPOA authority to inspect or maintain the interior of the units.

¶3.8 of the CCRs has never been utilized by the Board in any unit, including #4624, and is not at issue in this claim. This provision does not override Switzer's ownership in fee simple of his residential lots as stated in ¶3.5. A necessary prerequisite to enforcement of this provision is that the owner must fail to maintain a portion of his residential lot and have a hearing in front of SMPOA Board members. *See R. p. 70,¶3.8.* Neither of those instances occurred.

Plaintiffs claim that SMPOA and Mr. Kalsbeek were long aware of the potential carbon monoxide threat at the complex. (*Apps.' Brief, p. 7-8*). This claim is irrelevant to SMPOA's alleged duty to guests at the complex inside the units. It was FRPM's duty to maintain the interiors of the units. For example, on March 9, 2012, Mr. Kalsbeek was informed by Ms. Gaertner of FRPM that his unit, #3724, tested high in her scheduled testing of the units for carbon monoxide. (*R., p. 531, p. 235, p. 337*). Mr. Kalsbeek was a member of the entity that owned this unit. (*R. p. 531*). The fact that Mr. Kalsbeek was aware of the potential carbon monoxide issues at the complex, or of a high reading in his own unit, does not create a duty on the part of SMPOA to guests at the complex for issues in the interiors of the apartments.

The undisputed facts demonstrate that FRPM was working with the owners, including Switzer, in an attempt to fix the water heater issues at the complex. SMPOA's Board was involved with the issues at the complex that potentially affected many of its members to the extent that it acted as a sounding board for FRPM. (*R., p. 336, Kalsbeek Depo, pp. 43, ll. 2-20*). In this role, SMPOA had investigated issues at their own expense in an attempt to help the property management company with those issues.

In August of 2011, SMPOA member, Bill Raff, sent an email to Mr. Kalsbeek requesting that SMPOA pool its resources to hire an expert to look at the carbon monoxide situation at the complex. (*R., p. 324*). This email begins with Mr. Raff acknowledging that the water heater in the units are the owners' responsibility and suggesting that the SMPOA pool their resources as a group and try to find a solution to the issues involving the water heaters so that each individual owner did not have to attempt to find a solution on their own. (*Id.*). The Board agreed, responding that it would be beneficial to all owners to pool resources. (*R., p. 323*). Mr. Kalsbeek discussed that several issues at Sagecrest had been resolved in such a manner including: PRV's (pressure relief valves for water heaters), expansion tanks, filters, sewers, pool, and landscape. Some of these issues were common area issues, while some involved interior items. (*Id.*) Mr. Kalbeek indicated that the Board had been advised of the issues and was reviewing options. (*Id.*) He further indicated that SMPOA was researching several ideas with First Rate and that Sheila Thomason (First Rate employee) was keeping people informed and enacting the solutions. (*Id.*) (*emphasis added*).

In September of 2011, SMPOA hired Engineering Consultants, Inc. ("ECI") to investigate and evaluate the concerns. (*R., p. 531, ¶ 3; p. 742-743*). ECI reported its findings and recommendations to FRPM site manager, Tara Gaertner. (*Id., p. 742*). Ms. Gaertner then sent the recommended repairs from the report to all of the owners of the residential lots with instructions to let her know if they wanted to make any of the repairs to their units. (*R., p. 489-90*).

Mr. Switzer immediately replied to the email and asked Ms. Gaertner for recommendations regarding his units. (*R., p. 488*). Ms. Gaertner responded to Mr.

Switzer, informing him that all of his water heaters checked in good during the "CO detecting," indicating that he did not need to worry about the potential carbon monoxide issue in his units. (*R., p. 488*). FRPM hired and directed all of the contractors that performed maintenance. The SMPOA Board did not hire or direct any contractor to perform maintenance on any unit at the complex.

Plaintiffs set forth additional issues where they claim SMPOA controlled the interiors of the units, relying on FRPM employee statements that Mr. Kalsbeek directed them in regard to interior aspects at the complex. (*Apps.' Brief, pp. 8-13*). The true nature of the relationship, however, is revealed in the email chain previously set forth involving Tony Drost and Jon Kalsbeek in August of 2011 wherein Mr. Drost acknowledged that the water heaters are the owners' responsibility (*R., p. 786*) (*emphasis added*).

Additionally, Plaintiffs claim that Mr. Kalsbeek instructed Ms. Gaertner not to send information regarding the deadly CO threat to owners or tenants." (*Apps.' Brief., p. 12*). This allegation is irrelevant and completely misconstrues the events. As stated previously, on March 9, 2012, Ms. Gaertner informed Mr. Kalsbeek that the water heater in his unit #3724 tested high for levels of carbon monoxide. (*R., p. 447, p.531*). While discussing the issue, Ms. Gaertner informed Mr. Kalsbeek what she believed to be the dangerous level of carbon monoxide in a flue of the water heater vent. Mr. Kalsbeek believed that she misunderstood the exposure levels of carbon monoxide in a flue versus carbon monoxide levels from a reading of the carbon monoxide level in a room. He asked her not to send this information to other owners because it was inaccurate. (*R., p. 448*). She refused. (*R. p. 447*). She then redirected the conversation to Mr. Kalsbeek's

own water heater and its issues. (*Id.*)

B. SMPOA did not owe Premises Liability Duties to Third-Party Guests of a Tenant.

Plaintiffs claim that there is a question of fact regarding whether SMPOA controlled certain aspects of the interiors of the units located on the residential lots at the Sagecrest complex which created a premises liability duty. (*Apps.' Brief, p. 14-17*). Plaintiffs allege that Kalsbeek/SMPOA owed premises liability duties to the tenants and guests because Kalsbeek: (1) controlled installation of carbon monoxide detectors in the units; (2) controlled maintenance in the units; and, (3) controlled warnings to owners and tenants. Appellants make these premises liability allegations now, despite previously conceding that the SMPOA did not owe a premises liability-based duty to Plaintiffs to replace the water heater in unit 4624 because it lacks the power or authority to actually purchase or replace a water heater without an owner's consent. (*R. p. 802 FN. 1, 810; P's Supp brief Re: POA Motion for Summary Judgment*).

SMPOA cannot have a partial premises liability duty for certain maintenance issues on a property. The general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises in repair. *Heath v. Honker's Mini-Mart, Inc.,* 134 Idaho 711, 713, 8 P.3d 1254, 1256 (2000). If a party lacks control over a premises, that party is not liable for injuries sustained thereon. *See Johnson v. K-Mart Corp.*, 126 Idaho 316, 317, 882 P.2d 971, 972 (A tenant generally will not be held legally responsible for conditions existing outside the area over which it has possession or control.).

i. Plaintiffs have not set forth a proper premises liability claim against Defendants.

The issue of premises liability was not addressed by the District Court in its *Order Re: Motions for Reconsideration of Sagecrest POA and Switzer Summary Judgment Decisions*, likely due to Plaintiffs' concession that the SMPOA does not have a premises liability duty in regard to the water heater, and this issue is not properly before this Court. (*R., pp. 952-994*). This Court will not consider issues raised for the first time on appeal. *Enriquez v. Idaho Power Co.*, 152 Idaho 562, 566 (2012). *See also Combs v. Kelly Logging*, 115 Idaho 695, 698 (1989) (It is well established that arguments raised for the first time on appeal will not be heard); *Montalbano v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 837, 843, 264 P.3d 944, 950 (2011) (It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error.) In the event the Court allows this claim to be heard, SMPOA maintains that it did not have a premises liability duty to Plaintiffs.

Appellant's allegations that the SMPOA controlled (a) hard wire CO detector installation; (b) professional preventative maintenance; and (c) warning to owners and tenants are not proper premises liability claims because none of them are "dangerous conditions or activities on the property." The dangerous condition on the property was the water heater that eventually emitted a dangerous amount of carbon monoxide into the unit.

ii. Neither SMPOA's creating documents nor its contract with FRPM grant or allow any authority over the interiors of the units on the residential lots.

In a premises liability analysis, control of the property is a necessary prerequisite. *Heath,* 134 Idaho at 713. Plaintiffs' only argument on this issue is that ¶3.8 of the CCRs

gave the SMPOA absolute discretion to deem an owner's maintenance of his or her property unsatisfactory and enter the property to repair, maintain, or restore it. (*Apps.' Brief, p, 16*). However, Plaintiffs previously conceded that SMPOA did not have a premises liability duty to replace the water heater in unit #4624 because it lacks the power or authority to actually purchase or replace a water heater without an owner's consent. (*R. p. 802 FN. 1, 810; P's Supp brief Re: POA Motion for Summary Judgment*).

Under a premises liability theory, SMPOA can only have a duty to Plaintiffs if they own[3] or occupy the property. SMPOA neither owned nor occupied the residential lots at the complex. Property owners associations are created to manage the common areas for the owners of the units on a complex. The owners, or an agent on their behalf, manage the units and the tenants occupy the units.

In *McDevitt v. Sportsman's Warehouse, Inc.*, 151 Idaho 280 (2011) a lawsuit was brought by a pedestrian of a multi-tenant shopping mall against one of the tenants of the shopping mall after tripping and falling on a recessed irrigation box on sidewalk in front of tenant's retail store. Apparently the tenant had occasionally used the common area for a hot dog stand and displays. At issue was whether the tenant had a duty to make safe common areas which were not a part of its leased premises. 151 Idaho at 285.

In that case, this Court looked to the CCRs and lease of the tenant and landlord to find that the tenant could not, as a matter of law, control the premises because the governing documents did not give the tenant any authority to control the common area where the plaintiff was injured. 151 Idaho at 286.

[3] An agent for the owner, such as FRPM, could also potentially be liable to the Appellants.

Similarly, in our circumstance, the "common areas" are the only areas SMPOA is able to control at the complex. (*R. pp. 66, 68, ¶3.3.A*). SMPOA has a duty to maintain the common areas, and also certain parts of the exterior of the four plexes, for which it has an easement to access the exterior of each four plex. (*R. p. 69, ¶3.6*). The SMPOA has no authority over the interiors of the four plexes which are exclusively controlled by the owner of the four-plex. (*R. pp. 67, 69, ¶3.3.B, ¶3.5*).

¶3.8 of the CCRs is a provision intended to protect the value of the properties in the event an owner allows his property to fall into disrepair. ¶ 3.8 states:

> 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 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. The cost of such repair, maintenance and restoration shall be chargeable to the Owner of such Residential Lot or Four Plex and shall constitute a lien on the Residential Lot of such Owner, collectible in the same manner as Limited Assessments under this Declaration.

(*R., p. 70*) (*emphasis original*).

FRPM's General Manager, Liz Loop, agreed that the only circumstance SMPOA could take any action regarding a residential lot under this provision was if an owner had failed to maintain his or her unit, and only after taking the steps outlined in the provision. (*R., p. 116, Loop Depo., p. 77, ll. 1-17*). This provision does not override an owner's exclusive rights, set forth in ¶3.5 of the CCRs, in regard to the units on his residential lot. Regardless, this provision has never been utilized by the SMPOA Board. (*See R., p. 69,*

¶3.5). The undisputed evidence proves that FRPM and Switzer were actively maintaining his residential lot. (*R., pp. 488-90*).

SMPOA's agreement with FRPM was consistent and limited FRPM's corresponding duties to perform day-to-day administrative duties on behalf of the SMPOA for the common areas. (*R. p. 98-102; p. 141*).

iii. FRPM controlled the interiors of the units on behalf of the owners and had a duty to warn the tenants of any dangerous condition or activity.

SMPOA had no control of Switzer's residential lots and did not have a duty to its tenants for interior issues. Premises liability duties to guests of a tenant are narrow and a landowner is only required to share with the licensee knowledge of dangerous conditions or activities on the land. *See Stiles*, 2016 WL 3679909 at *2.

In *Stiles*, a tenant's guest filed a complaint against the landlord after he fell in the backyard and lacerated his arm on a shard of glass protruding from a bay window that was leaning on fence in backyard. This Court stated that a premises liability duty to a guest of the tenant is held by an "owner" or "possessor" of the property. 2016 WL 3679909 at *2. Tenants are held responsible as if they were the owner with respect to third parties....and a landlord generally is not responsible for injuries to third persons in privity with the tenant which are caused by failure to keep or put the demised premises in good repair. *Id.* (*citing Robinson v. Mueller*, 156 Idaho 237, 241, 322 P.3d 319, 323 (Ct.App.2014). This Court noted that the only exception to this rule is when the landlord created the hazard him or herself when he voluntarily undertakes repairs. *Id.* at *4.

In this case, SMPOA were neither making the repairs nor occupying the property. All of the maintenance work on the interiors of the units was contracted by FRPM and

approved and paid for by the owners of the units. The owner of #4624, Switzer, testified that maintenance was taken care of by FRPM and approved by himself:

> Q. What was your expectation with First Rate as to what they would contact you about in terms of maintenance?
>
> A. They would – they were my agent. They would contact me regarding any kind of maintenance, upkeep, service, preventative maintenance, problems, wear and tear, carpet, whatever the issue may be. They would be the one – they would contact me and ask me how I wanted to handle it, whether – and would advise me if it was something that could be repaired or replaced.

(*R., p. 203*). Further, FRPM site manager, Tara Gaertner, understood that maintenance and the installation of carbon monoxide detectors in the units was a FRPM responsibility. On October 25, 2012, Ms. Gaertner, Mr. Drost, Liz Loop, and Mr. Kalsbeek had a discussion regarding the installation of detectors after the Meridian City Fire Department was called to the complex for carbon monoxide being present in a unit. Ms. Gaertner stated that she wanted carbon monoxide detectors installed in all of the units:

> **Ms. [Gaertner]**: I mean, I understand that it's the owners' decision 'cause it's the owners' money we're spending. But...I'm the manager and it's my responsibility...

(*R., p. 414*) (*emphasis added*).

Not only did FRPM have a duty to perform general maintenance, but they were obligated to have "preventative maintenance" performed on #4624 bi-annually at the expense of the owner:

> Agent shall contract for bi-annual Preventative Maintenance at the expense of the Owner. This contractor will check all plumbing and plumbing fixtures, caulking, door stops, dryer vents, smoke detectors, and furnace filters and make necessary repairs.

(*R., p. 180*). In a discussion with Mr. Kalsbeek regarding such preventative maintenance and carbon monoxide installation, Ms. Gaertner attempted to explain that such maintenance had not been done because some owners did not approved the expense. (*R., p. 414*). Mr. Kalsbeek owned units at the complex and was familiar with the contracts between FRPM and the individual owners which allow FRPM to perform maintenance on the unit up to $250.00 a month without owner's authorization. (*R., p. 108; FRPM-Switzer Agreement, ¶9.5*). Mr. Kalsbeek asked her why she thought owners would have to approve such a minimal expense, to which Ms. Gaertner did not have a response. (*R., pp. 414-415*). Despite her protestations, Ms. Gaertner admitted that she was familiar with this provision in FRPM's agreement with the owners. (*R. p. 788, Gaertner Depo, p. 309, ll. 12-17*).

Further, Mr. Kalsbeek asked her why there had been carbon monoxide detectors installed in only 64 of the 194 units over the course of eight months, to which Ms. Gaertner replied that they had failed to perform preventative maintenance and carbon monoxide detector installation because they were too busy. (*R., p. 414-15*) ("Cause we've been swamped.")

FRPM was the entity that had the duty to share information with the owner, the tenant, and any guests, via the tenant. The tenant in #4624, Adra Kipper, communicated only with FRPM at the complex regarding maintenance issues in her apartment. (*R. pp. 892-893; Kipper Depo*). FRPM drafted and delivered notice to Ms. Kipper that her water heater had a potential issue and that they were dealing with it. (*R. p. 239, p. 242, pp. 939-940; see also R., p. 146; Affidavit of Tony Drost*). At the same time, FRPM provided Ms.

Kipper with a carbon monoxide detector. (*Id., p. 242*).[4]

In contrast, Ms. Kipper was not aware there was a property owners' association at the complex. She had never spoken to Mr. Kalsbeek or any other member of SMPOA Board. (*R., p. 897*). SMPOA did not have, nor assume, a duty to warn tenants regarding any issues at the complex. SMPOA served as a sounding board for the property manager when issues arose at the complex that concerned multiple owners. (*R., p. 336, Kalsbeek Depo, pp. 43, ll. 2-20; R., p. 323-24*). Plaintiffs are asking the Court to disregard established premises liability law and create an exception that allows the creation of a duty for non-owners or occupiers through allegations of voluntary undertakings.

In the event the Court were to impose such an exception it would have a chilling effect on all property owners' associations attempting to help their property management company identify solutions to problems at its own complex.

C. Neither Mr. Kalsbeek, nor SMPOA assumed a duty to third-party guests of a tenant.

i. This claim is not properly in front of the Court.

This claim is not properly before to this Court because Plaintiffs are raising a new issue. Plaintiffs have changed their argument regarding their allegations of SMPOA's assumed duties in this case. This Court will not consider issues raised for the first time on appeal. *Enriquez*, 152 Idaho at 566 (2012); *see also Montalbano*, 151 Idaho at 843, 264 P.3d at 950 (It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error.)

[4] There was not a working carbon monoxide detector in #4624 at the time of the incident because Ms. Kipper testified that the carbon monoxide detector started beeping due the batteries being low. Rather than replace the batteries, she took the batteries out and put the detector in the closet. (*Aug. p. 55-56*). In her lease agreement, Ms. Kipper was required to replace the batteries. (*R., p. 192-93, ¶39.1, ¶39.2, ¶42*).

At the District Court, Plaintiffs argued that the tenant, Adra Kipper, relied on SMPOA's assumed duties. Plaintiffs now have taken the position that SMPOA assumed duties and FRPM relied on SMPOA.

Plaintiffs are now also claiming SMPOA assumed different duties than they argued had been assumed by SMPOA at district court. In *Plaintiff's Supp. Brief Re: POA Motion for Summary Judgment*, Plaintiffs argued that SMPOA assumed a duty to replace the water heater by inducing reliance by the tenant, Adra Kipper. (*R., p. 813*). Plaintiffs also argued that SMPOA voluntarily assumed a duty and affirmatively increased the danger by implementing a false and dangerous protocol and actively stymied the response efforts by others. (*R., p. 816*). Plaintiffs stated that SMPOA would not allow FRPM to hire a professional plumber to maintain/clean the filters in the water heaters and also rejected FRPM's idea to have a handy-man contractor go door-to-door to ensure that each apartment unit had a functioning CO detector. (*Id.*); *see also Plaintiffs' Supp. Brief Re: POA Motion for Summary Judgment* ("SMPOA expressly represented to Adra Kipper that it would replace the water heater, and she relied on the POA's undertaking...The SMPOA induced Kipper's reliance by voluntarily assuming a duty to replace the water heater in 4624.") (*R., p. 813*).

On appeal, Plaintiffs are now arguing that FRPM relied on Mr. Kalsbeek's decision-making for installing hard-wired CO detectors, professional preventative maintenance, and issuing warnings to owners regarding the CO issue at the complex. (*Apps.' Brief, p. 21*). In the event the Court allows this claim to be heard, SMPOA maintains that it did not assume a duty to Plaintiffs.

ii. SMPOA did not assume any duties to Plaintiffs.

Plaintiffs allege that SMPOA assumed a duty to tenants' guests by voluntarily undertaking decisions regarding maintenance of the interiors of the units located on the residential lots. (*Apps.' Brief, p. 18-22*). This claim fails for two reasons: (1) As previously stated, SMPOA did not, and cannot, assume a duty to maintain property that it has no authority to control; and, (2) Neither the Plaintiffs, the owner of the unit or its agent FRPM, nor the tenant Ms. Kipper relied on SMPOA for any of these alleged assumed duties.

Plaintiffs argue that FRPM relied on Mr. Kalsbeek and SMPOA to make decisions regarding maintenance on the interior of the units. (*Apps.' Brief, p. 19*). To support this argument, Plaintiffs claim that this reliance was induced by Mr. Kalsbeek asserting control over FRPM because the SMPOA had the power to hire and fire the property management company and used this power to micromanage FRPM. (*Apps.' Brief, p. 20*). Plaintiffs further argue that Mr. Kalsbeek never informed FRPM that he lacked the power to make decisions regarding the interiors of the units. (*Id., p. 21*).[5]

Plaintiffs set forth this argument with knowledge that the property management company, FRPM, was contractually obligated to perform the maintenance, was being paid to perform the maintenance, and was relied upon by the owner of the unit, Mr. Switzer, and the tenants to perform the maintenance. The undisputed facts demonstrate that FRPM neglected to perform the maintenance and take care of issues in the units on behalf of the owners. After the lawsuit was initiated, FRPM blamed Mr. Kalsbeek for not

[5] Assumption of a duty requires that an act be performed. Mr. Kalsbeek "not informing" FRPM that he lacked the power to make decisions regarding the interiors of the units is not an assumption of a duty.

"allowing" it to properly do its job. This lack of accountability was not lost on Judge Copsey. (*See R., p. 984, Order Re: Motions to Reconsider*) (Discussing FRPM's claim that the SMPOA modified its contract with FRPM, Judge Copsey states, "In an attempt to avoid its responsibilities, First Rate tries to argue that Sagecrest POA modified ¶3.4").

Even when an affirmative duty generally is not present, a legal duty may arise if one voluntarily undertakes to perform an act, having no prior duty to do so. *Baccus v. AmeriPride Servs., Inc.*, 145 Idaho 346, 350 (2008). A duty arises in the negligence context when: (1) One previously has undertaken to perform a primarily safety-related service; (2) others are relying on the continued performance of the service; and (3) it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking. *Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 688 (2013). When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed. *Id.*

The underlying policy here arises from a person voluntarily assuming a position, and by filling that position another can reasonably rely on that person to act with reasonable care and provide protection from unreasonable risks of harm. *Id.* (*citing Turpen v. Granieri*, 133 Idaho 244, 248 (1999). Reliance on the duty is a required element of a claim by third parties. *Gagnon v. W. Bldg. Maint., Inc.*, 155 Idaho 112, 115 (2013).

Plaintiffs cite *Baccus, supra*, for their argument that SMPOA and/or Mr. Kalsbeek can be liable to a third party guest at the complex because the property management company, FRPM, relied on SMPOA to make decisions regarding the interiors of the

complex. (*Apps.' Brief, p. 19*).

In *Baccus,* the defendant had contracted to place non-slip safety mats at the entrance of a building. The defendant failed to place the safety mats on one occasion and Baccus slipped, fell and was injured. This Court found that by undertaking to place the safety mats which induced reliance by those in the building where the accident occurred, the defendant had assumed a duty by undertaking to perform an action. *Id.*, 145 Idaho at 352.

The Court stated the fact of the matter is that Ameripride was under a legal duty to prevent foreseeable harm once it promised to place mats at the southern entry. *Id.* Consequentially, by contracting to place mats at the entrance, Ameripride assumed a legal duty of care to third persons. *Id.*

Plaintiffs' reliance on this case is entirely misplaced as the Court stated that Ameripride had been hired by the worker's employer to provide safety mats, and had done so on prior occasions. 145 Idaho at 351-352. Thus, the defendants actually assumed a duty to the employees by placing mats in the entry. They could potentially be liable for the failure to continue to place mats in the entry because the employees were relying on the safety mats to be there, despite the fact that the employees did not know who was placing the mats. *Id.* This case is illustrative of what is missing in the Plaintiffs' allegations against the SMPOA; they are claiming that the SMPOA assumed a duty for acts that it never undertook.

Gagnon, supra, is also instructive on this issue. In *Gagnon*, an employee of a bank was injured after slipping on ice in the parking lot and brought a claim against his employer's snow removal contractor, alleging that it negligently maintained the parking

lot. Defendant was granted summary judgment based on the fact that it did not undertake an absolute duty to remove snow and distribute ice melt in the Wells Fargo Bank parking lot based on its contract. *Id.*, 155 Idaho at 114.

The employee appealed and this Court affirmed the district court's holding, stating, "it is undisputed that Western did not spread ice melt on the Hayden branch parking lot during the winter of 2007–2008 and therefore it is inconceivable that *Gagnon* could have relied upon it to do so." 155 Idaho at 115.

In our case, FRPM had contracted to maintain the interiors of the units and were maintaining the units. Therefore, they assumed a legal duty to tenants and their guests. All parties involved knew that FRPM had this duty: Mr. Switzer,[6] Mr. Drost,[7] Ms. Gaertner,[8] and Mr. Kalsbeek all stated that the issues surrounding the water heaters were owner issues and FRPM's responsibility to maintain as the agent. SMPOA, on the other hand, could not assume a duty that FRPM was legally obligated to perform on behalf of the owners. Consistently, FRPM could not rely on SMPOA for the duties it was contractually obligated to perform.

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[6] "[FRPM was] my agent. They would contact me regarding any kind of maintenance, upkeep, service, preventative maintenance, problems, wear and tear, carpet, whatever the issue may be. They would be the one – they would contact me and ask me how I wanted to handle it, whether – and would advise me if it was something that could be repaired or replaced." (*R., p. 203*).

[7] Mr. Kalsbeek stated, "the water heaters are interior items of each unit and is therefore an owners' choice on how to handle this situation, not the POA. This makes the cost for inspections and evaluations as owner may request, owner responsibility." Mr. Drost replied, "Everyone understands that. As you have requested, FRPM is keeping the POA informed of any major issues happening within the complex." (*R., p. 786*).

[8] "I mean, I understand that it's the owners' decision 'cause it's the owners' money we're spending. But…I'm the manager and it's my responsibility." (*R., p. 414*).

Plaintiffs claim that SMPOA assumed a duty to install the detectors due to the fact that FRPM "asked Mr. Kalsbeek for permission to immediately install hard-wired CO detectors in all units[and] Mr. Kalsbeek never said that he lacked the power to make this decision." (*Apps.' Brief, p. 21*) (*emphasis added*). Mr. Kalsbeek's alleged non-response is not an affirmative act creating an assumption of a duty to install detectors. In fact, FRPM had been having detectors installed over the course of eight months but failed to have them installed in every unit. (*R., p. 414-15*) (Ms. Gaertner stated FRPM was "swamped" and too busy to set up the installation. She also claimed that some owners didn't approve the cost.). The SMPOA did not install, or contract to have installed, a single carbon monoxide detector at the Sagecrest complex.

Plaintiffs also claim that the SMPOA assumed a duty over the preventative maintenance of the interiors of the units. (*Apps.' Brief, p. 21*). Plaintiffs argue that when asked by an FRPM employee regarding the maintenance, "Mr. Kalsbeek never said that he lacked the power to make this decision." (*Id.*) Again, Mr. Kalsbeek's alleged non-response is not an affirmative act creating an assumption of duty to install detectors. Indeed, it was FRPM who was contractually obligated to have preventative maintenance performed on #4624 bi-annually at the expense of the owner:

> Agent shall contract for bi-annual Preventative Maintenance at the expense of the Owner. This contractor will check all plumbing and plumbing fixtures, caulking, door stops, dryer vents, smoke detectors, and furnace filters and make necessary repairs.

(*R., p. 180*). SMPOA did not perform preventative maintenance on a single unit at the Sagecrest complex.

Plaintiffs also argue that SMPOA prevented FRPM from sending a letter from Ben Davis to the owners warning of the dangers of the water heaters to the owners of the

complex. (*Apps.' Brief, p. 21*). As stated above, this misconstrues the facts. Further, disagreeing with FRPM's decision to send erroneous information to the owners is not an affirmative act creating a duty to warn, especially where FRPM sent the information anyway.

Finally, Plaintiffs generally claim that "if FRPM had not been relying on Mr. Kalsbeek's decision-making, it would have provided adequate warnings to owners and tenants." However, it was FRPM's duty to send the owners adequate warnings of the dangers of the potential carbon monoxide issues with the water heaters and FRPM did send such information to the owners. Mr. Davis's letter was received by FRPM in July of 2011. (*R., p. 647; Plaintiffs' Response in Opposition to Defendants Kalsbeek, Arla, Schwab, and Meisner's Motion for Summary Judgment*). Ms. Gaertner sent a letter to the owners on November 9, 2011 with information regarding repairs to prevent carbon monoxide in the units. (*R., p. 489-90*). She also sent a letter to all of the owners in August of 2011 and again in March of 2012 with information of the carbon monoxide levels and issues in the units at the complex. (*R., p. 447-48*).

Most importantly, in regard to unit #4624, Ms. Gaertner sent recommended repairs from the ECI report to all of the owners of the residential lots on November 9, 2011, including Switzer, with instructions to let her know if they wanted to make any of the repairs to their units or replace their water heaters. (*R., p. 489-90*). Mr. Switzer immediately replied to the email and asked Ms. Gaertner for recommendations regarding his units. (*R., p. 488*). Ms. Gaertner responded to Mr. Switzer, informing him that all of his water heaters checked in good during the "CO detecting," indicating that he did not need to worry about the potential carbon monoxide issue in his units. (*R., p. 488*). The

water heater was not replaced in unit #4624.

SMPOA undertook no acts to warn the tenants of the dangerous condition on the property previously, and as a result, did not assume a duty to do so in the future.

iii. SMPOA is not vicariously liable for the acts or omissions of FRPM.

FRPM was not the agent for SMPOA for any issues related to the interior of unit #4624. SMPOA had no right to control and did not control the activities of FRPM in regard to the residential lots. Therefore, SMPOA cannot be vicariously liable for the acts or omissions of FRPM in regard to the interior of unit #4624; RFPM was Switzer's agent as to the interior of unit #4624. *See Adams v. Krueger*, *supra*.

The CCRs provide that the owners had the exclusive right to the interiors of their units. (*R., p 539-540; ¶3.5*). Consistently, owners have the attendant duty to maintain the entire interior of their units including appliances and plumbing and plumbing fixtures. (*R., p. 540,* ¶ 3.3). "Exclusive right" is defined as a right "vested in one person, entity, or body to do something or be protected from something." RIGHT, *Black's Law Dictionary* (10th ed. 2014).

The contracts between SMPOA and FRPM, and Switzer and FRPM, further illustrate that FRPM was not an agent for SMPOA with regard to the interior of unit #4624. The contract between FRPM and Switzer specifically allowed FRPM to make ordinary repairs and replacement necessary to preserve and maintain the interior of Switzer's unit. (*R. p. 180*). FRPM did not need Switzer's approval to make repairs when the cost was below $250.00. *Id.* The contract between SMPOA and FRPM provides no authority for FRPM to act with regard to the interior of a building, consistent with the CCRs. (*R., p. 1019-1020*, ¶3.4).

Plaintiffs argued below that the testimony of the President of First Rate and course of conduct modified the agreement between FRPM and SMPOA. The trial court correctly held that neither could modify the agreement without placing it in writing pursuant to Section 10 of the contract. (*R., p.985; p. 101, ¶10*). FRPM could not unilaterally modify the contract. (*City of Meridian v. Petra, Inc.*, 154 Idaho 425, 436, 299 P.3d 232, 243 (2013)). Plaintiffs now argue that "actual conduct" between SMPOA and FRPM somehow makes FRPM the agent of SMPOA.

Whether facts sufficient to constitute an agency relationship exist is a question of fact for the jury, however, whether a given set of facts are sufficient to constitute an agency relationship is a question of law appropriate for review by the Supreme Court. *Humphries v. Becker*, 159 Idaho 728, 735, fn. 2 (2016).

An agency relationship is created through the acts of the principal who either: (1) expressly grants the agent authority to conduct certain actions on his or her behalf; (2) impliedly grants the agent authority to conduct certain actions which are necessary to complete those actions that were expressly authorized; or (3) apparently grants the agent authority to act through conduct towards a third party indicating that express or implied authority has been granted. *Bailey v. Ness,* 109 Idaho 495, 497, 708 P.2d 900, 902 (1985). Apparent authority cannot be created by the acts of the agent alone. *Id.* Agency relationships are limited in scope to the express, implied, and apparent authority granted by the principal. Only acts by the agent that are within the scope of the agency relationship affect the principal's legal liability. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006). *Humphries*, 159 Idaho at 735.

The standard for apparent authority stated in section 2.03 of the Restatement (Third) of Agency and section 429 of the Restatement (Second) of Torts has two essential elements: 1) conduct by the principal that would lead a person to reasonably believe that another person acts on the principal's behalf, *i.e.*, conduct by the principal 'holding out' that person as its agent; and 2) acceptance of the agent's service by one who reasonably believes it is rendered on behalf of the principal. *Navo v. Bingham Memorial Hosp.,* 160 Idaho 363, 373 P.3d 681, 693 (2016) [*citing*, *Jones v. HealthS. Treasure Valley Hosp.*, 147 Idaho 109 (2009).

Plaintiffs have conceded that there is no actual or implied authority and are relying upon apparent authority for their argument that "actual conduct" can create an agency relationship. This argument is unavailing to the Plaintiffs as apparent authority rests upon the conduct of principal, and reliance by a third party. Ms. Kipper, the third party, had no knowledge of the existence of SMPOA and therefore could not have relied on SMPOA. (*R., p. 896-897*). In addition, Plaintiffs can point to no conduct on the part of SMPOA that would lead a person to reasonably believe that FRPM acted on its behalf. To the contrary, the undisputed facts of this case demonstrate that SMPOA had no authority over FRPM in regards to the interior of the complex units.

For instance, in an email from Mr. Kalsbeek to Mr. Drost, Mr. Kalsbeek specifically stated: "Just to clarify, the water heaters are interior items of each unit and is therefore an owner's choice on how to handle the situation, not the POA. This makes the cost for inspections and evaluations an owner may request, owner responsibility." (*R., p. 786*). In reply, Mr. Drost stated: "Everyone understands that. As you have requested, FRPM is keeping the POA informed of any major issues happening within the complex.

Also, their [sic] certainly will be savings for all if a common action/repairs is made, IF [sic] we buy 100 water heaters at one time, we should be able to get them at a reduced price. If we do them one at a time, cost will be more. We are just trying to communicate as best we can." (*Id.*).

After the owner's meeting on October 31, 2011 (in which the owners were advised by Kalsbeek (as president) that a recommendation had been made by an engineer for the owners to replace the water heaters), FRPM sent out an email on November 9, 2011 to the owners recommending repair for the replacement of existing water heaters and replacement of hard wired CO/smoke detectors. (*R. p. 228-229*). The building owners, including Switzer, were informed by FRPM: "again this work is highly recommended. Please let me know what you would like to have me done and I can get that scheduled as soon as possible." (*Id.*) The water heater in Unit #4624 was not replaced. (*R. p. 488*).

The cases cited by Plaintiffs from other jurisdictions are unpersuasive in that they address issues of apparent authority which are not present in this case. However, *Barefoot v. International Brotherhood of Teamsters*, 424 F.2d 1001, 1005 (1970), provides excellent guidance on allegations based upon an agent's conduct. In that case, the Court held that there was "no evidence tending to establish [agent's] apparent or actual authority other than testimony relating to the words and conduct of [agent] himself." *Id.* The Court went on: "it is generally understood however that the ostensible authority must result from the words and conduct of the principal rather than the agent". *Id.* Here, the only evidence presented by Plaintiffs regarding the alleged apparent authority by SMPOA is the testimony of Mr. Drost. As such, Plaintiffs have failed to

establish that FRPM was acting as an agent of SMPOA.

Plaintiffs' argument that the FRPM was the dual agent of Switzer Trust and SMPOA is also unsupported by the evidence. It is undisputed that SMPOA had authority to direct FRPM with regard to common areas, and equally undisputed that the Switzer Trust had exclusive control over the interior of the unit by the CCRs and contracts with FRPM. This dichotomy is demonstrated by the actual conduct of FRPM. For example, there were several residential units that were not managed by FRPM. FRPM had no contact with the owners or tenants of those units and took no action of any kind in those units. (*R., pp. 870-77, Gaertner Depo; p. 994, Orders Re: Motions to Reconsider*). If FRPM was acting on behalf of the SMPOA, it would have contacted and taken action for every unit, not just the unit owners that had a contract with FRPM.

"[S]everal principals may be bound pursuant to the acts and representations of a common agent, but it must appear that authority was given by all the alleged principals, and an agent cannot bind one principal in the separate business of another." 2A C.J.S. *Agency* Section 245, at 953. (emphasis added.) (*Cited by Restatement (Third) of Agency § 316*, for the proposition that multiple principals are not bound by an agent's act in the absence of an assent, *Reporter's notes, Section B*); *First Nat. Bank of Omaha v. Acceptance Ins. Companies, Inc.*, 675 N.W.2d 689, 702 (Neb. App. 2004). With regard to the interiors of unit #4629, FRPM was acting solely as agent of Switzer.

IV. CONCLUSION

SMPOA respectfully requests the Court affirm the district court's decision, finding that it owed no duty and assumed no duties to Plaintiffs. SMPOA further

requests that the Court find that FRPM was not its agent as to the interior of unit #4624. SMPOA also requests an award of their attorney fees and costs incurred on appeal.

DATED this 23rd day of August, 2016.

Michael J. Elia
Moore & Elia, LLP
PO Box 6756
Boise, ID 83707
Attorneys for Defendant-Respondent, Sagecrest Multi Family Property Owners' Association, Inc.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that two bound hard copies of this document were served on each party via U.S. Mail at the following addresses:

Charles F. Peterson, Jr.
PETERSON LAWYERS
913 W. River Street, Ste. 400
Boise, ID 83702

_✓_ U.S. Mail, postage prepaid
_____ Hand Delivered
____ Facsimile Transmission
_____ E-Mail: chuck@petersonlawyers.com

G. Bryan Ulmer
Tyson E. Logan
Michael F. Lutz
THE SPENCE LAW FIRM
PO Box 548
15 S. Jackson St.
Jackson, WY 83001
Attorneys for Plaintiffs-Appellants

_✓_ U.S. Mail, postage prepaid
_____ Hand Delivered
____ Facsimile Transmission
_____ E-Mail: logan@spencelawyers.com
ulmer@spencelawyers.com
mlutz@spencelawyers.com

John M. Howell
BARNUM HOWELL, PLLC
380 S. 4th Street, Suite 104
PO Box 2616
Boise, ID 83701-2616
Attorneys for Jon Kalsbeek

_✓_ U.S. Mail, postage prepaid
_____ Hand Delivered
____ Facsimile Transmission
_____ E-Mail: john@barnumhowell.com

DATED and certified this 23rd day of August, 2016.

Michael J. Elia
Moore & Elia, LLP
PO Box 6756
Boise, ID 83707
Attorneys for Defendant-Respondent, Sagecrest Multi Family Property Owners' Association, Inc.