10-3-2016

Forbush v. Sagecrest Multi Family Appellant's Reply 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' REPLY BRIEF

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

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I. SUMMARY

Most of the material facts are undisputed. The disputed facts are for the jury to resolve. Applying Idaho law to the undisputed and disputed facts, a reasonable juror could find the POA liable based on (1) premises liability, (2) voluntary undertaking, and (3) agency theories; and could find Mr. Kalsbeek liable for his voluntary undertakings. Therefore, this Court should reverse the summary judgments.[1]

Part A shows that Appellants preserved the issues on appeal by making virtually identical arguments below.[2] Part B shows that Respondents exercised actual control at Sagecrest, and in particular over (1) hard-wired CO detector installation; (2) professional preventative maintenance; and (3) warnings to owners and tenants. Whether that actual control was also rightful is irrelevant, but in any event Respondents had authority over these matters. Part C shows that Respondents owed duties and can be held liable for actually exercising control in a manner that led to Ms. Halowell suffering a severe brain injury and Mr. Forbush being killed.

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[1] Because the summary judgments should be reversed, Respondents' requests for attorney's fees should be denied. No party litigated this appeal frivolously or unreasonably. *Firmage v. Snow*, 158 Idaho 343, 351, 347 P.3d 191, 199 (2015). The factual and legal issues are complex. Even the District Court found this case challenging, reversing its initial decision denying summary judgment for the POA. Recognizing this, Appellants did not request fees from Respondents.

[2] With the exception of the issue of whether Mr. Kalsbeek owed premises-liability duties, which Appellants hereby withdraw.

II. ARGUMENT

A. Appellants preserved the arguments on appeal.

1. Appellants properly pled their claims.

The POA suggests without support that Appellants did not plead premises-liability and voluntary-undertaking duties. POA Br. at 3 n.1, 8. Under Idaho's notice-pleading standard,[3] Appellants adequately pled premises-liability and voluntary-undertaking duties by pleading the facts giving rise to these duties. "Under notice pleading, a party is no longer slavishly bound to stating particular theories in its pleadings." *Navo v. Bingham Mem'l Hosp.*, 160 Idaho 363, 375, 373 P.3d 681, 693 (2016) (quotation omitted). "It is well-established that '[a] complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief.' " *Skinner v. U.S. Bank Home Mortgage*, 159 Idaho 642, 650 n.2, 365 P.3d 398, 406 n.2 (2016) (alteration in original) (quotation omitted). "[E]ven if a complaint does not specifically state a given cause of action, it can satisfy the pleading requirement so long as the factual allegations themselves could fairly put the opposing party on notice of the claim against it." *Pierce v. McMullen*, 156 Idaho 465, 473-74, 328 P.3d 445, 453-54 (2014) (alteration in original) (quotation omitted). Here, the operative Complaint sets forth ample facts for imposing duties on

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[3] The POA failed to cite the legal standard for pleading and therefore waived any argument that Appellants' pleading was inadequate. *See Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 157 Idaho 732, 743, 339 P.3d 1136, 1147 (2014) ("A party waives an issue cited on appeal if either authority or argument is lacking . . . ." (quotation omitted)).

Respondents. R. pp. 601-25. Indeed, the POA quoted numerous relevant allegations. *See* POA Br. at 2-3 (quoting R. pp. 612-13).[4]

2. Appellants preserved their premises-liability arguments against the POA.

The POA confusingly claims that because the Appellants withdrew *failure to install a new water heater* as a factual basis for imposing premises liability duties, they somehow withdrew their entire premises liability claim. POA Br. at 15-16. Not so. A party's decision not to pursue one factual basis for a particular claim does not somehow waive the entire claim. The POA further claims that Appellants are raising premises liability for the first time on appeal. *Id.* at 16. Appellants clearly argued premises liability below. *See* R. pp. 352-55, 810-12.[5]

3. Appellants preserved their voluntary-undertaking arguments.

The POA claims that Appellants failed to preserve their voluntary-undertaking arguments. POA Br. at 22-23. That is false. Appellants argued below that the POA dominated FRPM and directed its actions, thereby assuming voluntary-undertaking duties:

> By implementing a false and dangerous response protocol, which prevented others from responding in a safer and more reasonable manner, the POA increased the likelihood that someone at the property would be poisoned by CO. The POA actively stymied the response efforts by others. For instance, First Rate suggested hiring a professional plumber to maintain/clean the filters in the water

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[4] Moreover, the District Court did not rule that Appellants inadequately pled premises-liability or voluntary-undertaking duties; nor did it reach the secondary question of whether, if these duties were not adequately pled, leave to amend would be proper.

[5] The POA's contention that there was no adverse ruling below is nonsensical. POA Br. at 16. The District Court necessarily rejected premises liability as a theory of recovery; otherwise it would not have granted summary judgment for the POA.

> heaters (to decrease the risk that a water heater would clog and fail), yet the POA prevented this fix from being implemented. Later, First Rate sought to have a handy-man contractor go door-to-door to ensure that each and every apartment unit had a functioning CO detector to warn of a possible CO exposure; but the POA rejected this idea. Because the POA exerted absolute control over the property manager's operation and management at the property, First Rate did not even seek owner input on issues like this — the POA made the call. In doing so, the POA increased the risk that tenants or their guests would be poisoned. Consistent with §§ 323 and 324A [which discuss voluntary undertakings], the POA owed Plaintiffs a duty because it voluntarily assumed duties and then increased the danger of a CO incident.

R. p. 816.[6]

B. There are ample facts from which a reasonable juror could find that Respondents dominated FRPM and had control over (1) hard-wired CO detector installation; (2) professional preventative maintenance; and (3) warnings to owners and tenants.

1. Respondents had financial leverage over FRPM that enabled Respondents to dominate FRPM.

The key facts regarding Respondents' financial leverage over FRPM are undisputed. It is undisputed that Sagecrest was FRPM's largest account ever. Appellants' Br. at 4. It is undisputed that all owners, including Mr. Switzer — an excepting only four "grandfathered" buildings that were under other management prior to the CCR's — were required to employ the same property manager that the POA employed. *Id.* at 5 & n.3. It is undisputed that the POA, through Mr. Kalsbeek, determined whether on-site FRPM employees would be paid to work overtime, including on unit-interior issues. *Id.* at 5-6.

However, there are some factual disputes regarding Respondents' leverage over FRPM:

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[6] The fact that the District Court addressed in its Order whether others besides Ms. Kipper relied on the POA, *see* Appellants' Br. at 19 n.13 (citing R. p. 987), is further evidence that this issue was preserved.

Payment of Wages: Mr. Kalsbeek disputes that the POA paid FRPM's on-site employees' wages, noting that the POA-FRPM[7] Agreement § 5.1 limits such payment to those employees "fully assigned to the [POA's] premises and fully dedicated to the [POA's] business . . . ." Kalsbeek Br. at 5. This begs the question of what premises the POA exerted control over and what business it undertook. At any rate, an email exchange shows that the POA paid FRPM leasing manager Tara Gaertner's wages, regardless of what the Agreement specified. R. p. 710 (refusing to pay Ms. Gaertner overtime).

Replacement of Property Manager: The POA asserts that, under CCR's § 6.6A, a vote of 75% of owners was required to remove and replace the property manager. POA Br. at 11. Section 6.6A states: "[t]his said management company" — i.e. H & H Property Management, which was FRPM's predecessor — "at any time could be removed from this management with a 75% vote from the current members . . . ." R. p. 96. First, the plain text of § 6.6A *permitted* an owner vote, but did not separately *forbid* action by the POA Board. Second, § 6.6A addresses removal of *H & H* — i.e. "[t]his said management company." It is silent on the methods for removing any subsequent property manager, such as FRPM. Third, the POA Board did in fact accept FRPM's resignation, investigate new property managers, and select Verity Property Management as FRPM's successor — all without any prior notice to, or vote by, the owners. Appellants' Br. at 5 n.4 (citing R. p. 841). The POA Board did not follow any vote requirement.

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[7] Mr. Kalsbeek cited to the ¶ 5.1 of the Switzer-FRPM Agreement at R. p. 106, but apparently intended to cite to ¶ 5.1 of the POA-FRPM Agreement at R. p. 100.

While some details of Respondents' financial leverage over FRPM are disputed, the key facts are not, and there is ample evidence from which a jury could find that Respondents had financial leverage over FRPM.

2. The witness testimony evidencing control cannot be disregarded based on allegations of bias — witness credibility is an issue for the jury, and Respondents' witness testimony is also biased.

FRPM owner Tony Drost, maintenance supervisor Sheila Thomason, and leasing manager Tara Gaertner testified that Mr. Kalsbeek micromanaged numerous activities in unit interiors. Mr. Kalsbeek micromanaged dishwasher replacement, CO testing, and filter changes — and even demanded a detailed daily logbook of all of FRPM's activities. Appellants' Br. at 3-4. Respondents do not directly dispute that testimony.

The POA characterizes this testimony as a "veiled attempt" by the witnesses to shift blame from FRPM to the POA. POA Br. at 9, 24-25. The POA's argument boils down to an assertion that the testimony is not credible because the FRPM employees were biased. Credibility cannot be weighed on summary judgment. *See Vanderford Co. v. Knudson*, 150 Idaho 664, 674, 249 P.3d 857, 867 (2011) ("[J]udging credibility is not appropriate during summary judgment proceedings where no evidentiary hearing has been held."). It is for the jury to determine whose version of events is more credible.[8]

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[8] When doing so, the jury may take into account corroborating evidence — such as the numerous communications in which Mr. Kalsbeek asserted control over FRPM. *See, e.g.*, R. pp. 457-59, 710, 838-39.

3. Control over water heater replacement is irrelevant in this appeal.

Appellants' Opening Brief was quite clear that Respondents exercised control over three areas: (1) hard-wired CO detector installation; (2) professional preventative maintenance; and (3) warnings to owners and tenants. Respondents discuss at length an irrelevant fourth issue — control over water heater replacement. POA Br. at 10, 14, 17, 27 n.7, 32-33; Kalsbeek Br. at 6-9. That is not an issue in this appeal.

4. Respondents had control over hard-wired CO detector installation.

Most of the key facts showing Respondents' control over hard-wired CO detector installation are undisputed. It is undisputed that Mr. Kalsbeek, as POA President, established written Procedures for piecemeal hard-wired CO detector installation. Appellants' Br. at 8-9. It is undisputed that Mr. Kalsbeek stated that owner approval was not required for installation of hard-wired CO detectors under his Procedures. *Id.* at 9. It is undisputed that hard-wired CO detectors could have been installed in a single day prior to the poisoning. *Id.* at 11 n.7.

The POA attempts to generate a factual dispute by misconstruing exchanges between Mr. Kalsbeek, Mr. Drost, and Ms. Gaertner during their October 25, 2012 meeting (the transcript of which appears on pages 413 to 419 of the Record).

First, the POA claims that Ms. Gaertner admitted that installing hard-wired CO detectors was her responsibility. POA Br. at 20. She did not. The POA deleted the emphasized words in Ms. Gaertner's quotation, changing its meaning:

> I mean, I understand that it's the owners' decision 'cause it's the owners' money we're spending.[9] But ***as far as the fire department's concerned,*** I'm the manager and it's my responsibility.

R. p. 414 at Transcript p. 11, Ll. 2-5. Ms. Gaertner's *speculation about the fire department's perception of her role* is not evidence of the actual allocation of responsibility.

Second, the POA suggests that it was FRPM's lack of diligence — rather than Mr. Kalsbeek's piecemeal installation Procedures — that delayed installation of a hard-wired CO detector in Unit 4624. POA Br. at 21. Yet again, the POA misconstrues what the meeting participants actually said. Ms. Gaertner did not say that FRPM was unable to install CO detectors because it was too "swamped" to do so. Rather, Mr. Kalsbeek's Procedures tied installation to sporadic events such as turnovers and preventative maintenance. FRPM had been too swamped to do full preventative maintenance:

> Mr. Drost: We haven't done preventative maintenance.
> Ms. [Gaertner]: All summer.
> Mr. Drost: Right and —
> Ms. [Gaertner]: 'Cause we've been swamped.

R. p. 415 at Transcript p. 15, Ll. 6-10. Because there was a bottleneck in preventative maintenance, Ms. Gaertner reasonably suggested separating CO detector installation from preventative maintenance, and fast-tracking installations:

> So there are still some units that, obviously, don't have them [hard-wired CO detectors] in them. So those units I would like Chris to go through and install one just so we're all safe, the tenants, us, the Association, everybody.

R. p. 415 at Transcript p. 16, Ll. 10-13.[10]

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[9] Mr. Kalsbeek corrected Ms. Gaertner on this, stating that there was "absolutely nothing about owners' approval" in his Procedures. R. p. 415 at Transcript p. 14, Ll. 2-18.

Even after he was indisputably aware of the slow pace of hard-wired CO detector installation under his Procedures, Mr. Kalsbeek reaffirmed them. R. p. 416 at Transcript p. 17, Ll. 15-16. Had Mr. Kalsbeek heeded Ms. Gaertner's request to fast-track CO detector installation, this tragedy would not have happened.

5. Respondents had control over professional preventative maintenance.

Yet again, most of the key facts are undisputed. It is undisputed that Ms. Gaertner informed Mr. Kalsbeek that it was necessary for a professional plumber to preform preventative maintenance, that Ms. Gaertner forwarded him cost estimates and asked for permission to hire a plumber, that Mr. Kalsbeek promised that the POA would review the request and "get back to you next week," but that Mr. Kalsbeek failed to grant permission. Appellants' Br. at 11.

Mr. Kalsbeek states that his email on page 424 of the Record "speaks for itself." Kalsbeek Br. at 23. But a reasonable juror could find that Mr. Kalsbeek's pointed series of rhetorical questions was an objection to hiring a professional plumber based on cost. Mr. Kalsbeek has not established as a matter of law that this interpretation is wrong. Yet again, there are disputed facts and inferences for the jury to decide.

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[10] Ms. Gaertner's suggestion at the October 25 meeting is consistent with her October 11 email to Mr. Kalsbeek. Appellants' Br. at 9 (quoting R. p. 704). It is also consistent with a draft email Ms. Gaertner wrote. Appellants' Br. at 10 n.5 (quoting R. p. 442 ("I recommend putting CO combo detectors in every unit and be done with it.")).

6. Respondents had control over warnings to owners and tenants.

Once more, most of the key facts are undisputed. It is undisputed that that Mr. Kalsbeek's instruction to Ms. Thomason was the only thing that prevented her from sending the Ben Davis Letter to all owners. It is undisputed that the Ben Davis Letter starkly warned of an imminent risk of death due to CO poisoning at Sagecrest. Respondents do not even dispute that a juror could reasonably infer that, had owner Matthew Switzer or tenant Adra Kipper received the Ben Davis Letter, they would have taken protective action. Appellants' Br. at 12-13.

a. The information provided to owners was insufficient to warn them of an imminent threat of death.

The POA conflates the limited information that Ms. Gaertner provided (and to which Mr. Kalsbeek later objected) with the urgent Ben Davis Letter that Ms. Thomason did not provide (due to Mr. Kalsbeek's command not to). POA Br. 28-29 (citing R. pp. 447-48, 488-90). The information that Ms. Gaertner sent was not the Ben Davis Letter, was significantly less dire, and did not warn of the imminent risk of death.[11] R. pp. 447 (Ms. Gaertner's email to Mr. Kalsbeek stating that she had already provided a chart discussing effects of various levels of CO exposure in the abstract), 489-90 (Ms. Gaertner's email to owners generally suggesting repairs, but not warning of imminent risk of death). A reasonable juror could find that, although Mr. Kalsbeek was too late to prevent Ms. Gaertner from sending some limited information, he prevented Ms. Thomason from sending an adequate warning of the deadly threat.

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[11] The POA further suggests that the Ben Davis Letter was "erroneous." POA Br. at 29. There is no support for this in the record. It is yet another disputed issue for the jury.

b. Although Ms. Gaertner provided limited information to owners before Mr. Kalsbeek objected, Mr. Kalsbeek's email ordering Ms. Gaertner to desist is a clear assertion of control over warnings.

The POA attempts to re-characterize the email exchange between Mr. Kalsbeek and Ms. Gaertner on pages 447-48 of the Record. POA Br. at 14. First, the POA asserts that Mr. Kalsbeek believed that the information Ms. Gaertner provided to owners was inaccurate. *Id.* Second, the POA correctly notes that Ms. Gaertner sent some limited information to owners. *Id.*

There is no support in the record that Mr. Kalsbeek was right and Ms. Gaertner was wrong. This is yet another disputed issue for the jury. And, regardless of who was right, Mr. Kalsbeek *instructed Ms. Gaertner not to send it.* R. p. 448. That is a clear assertion of control (although Ms. Gaertner then clarified that she had already sent the information). R. p. 447. Tellingly, she feared she would face serious consequences for acting without Mr. Kalsbeek's prior permission. *Id.* (informing FRPM general manager "there's about to be a s--- storm").

7. Respondents had authority to exercise control.

It is irrelevant whether Mr. Kalsbeek and the POA's exercise of control over hard-wired CO detector installation, professional preventative maintenance, and warnings to owners and tenants was with, or without, proper authority. *See* Appellants' Br. at 15-16 & n.11, 24-25. A defendant who could otherwise be held liable due to his or her exercise of control does not enjoy immunity merely because that exercise of control was without rightful authority. Thus, it is not necessary for the Court to wade into the authority question. However, to the extent that the Court determines that this inquiry is necessary, the CCR's either plainly gave the POA power to

control these three issues — or at a minimum the CCR's are ambiguous, making their interpretation a jury question. Appellants' Br. at 16-17.

a. Section 3.8 applies to unit interiors.[12]

It is undisputed that CCR's §§ 3.3 and 3.5 gave the POA control over most parts of unit exteriors and gave unit owners control over unit interiors. It is undisputed that FRPM contracted with owners to repair and maintain their unit interiors — and even to make repairs under $250 without prior owner approval. But § 3.8 provided a mechanism for the POA to override that division of authority and to exercise control over unit interiors. CCR's § 3.8 gave the POA the power to determine that an owner was not maintaining "any portion" of his or her property in "a manner reasonabl[y] satisfactory to the Board." In such instances the POA could "enter upon the Residential Lot or Four Plex and repair, maintain and restore the Residential Lot, or the Four Plex" — including through the POA's agent, FRPM. Appellants' Br. at 6-7 (quoting R. p. 70). The POA ignores § 3.8's text, and instead relies on its own interpretation of other sections and documents in an effort to limit § 3.8 to unit exteriors.[13]

Section 3.8: The POA relies on the District Court's Order for the proposition that § 3.8 applies to unit exteriors only. POA Br. at 11. This interpretation is incompatible with § 3.8's

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[12] Even if only rightful control as opposed to actual control were relevant, and even if the CCR's did not give Mr. Kalsbeek and the POA rightful control over unit interiors, that would still have no bearing on the third area over which Mr. Kalsbeek and the POA exercised control: warnings to owners and tenants. Warnings are not maintenance or repairs in a unit interior, and Respondents have never pointed to any provision that supposedly limited their authority to control warnings.

[13] Ironically, the POA later relies on testimony that § 3.8 allowed the POA to "***go into*** *a unit and make repairs.*" POA Br. at 18 (citing R. p. 116 at Dep. Tr. p. 77, Ll. 2-17 (emphasis added)). This confirms that § 3.8 gave the POA authority to "**go into**" unit interiors.

plain text. Section 3.8 applies to the entire "Residential Lot, or the Four Plex" if an owner fails to maintain "any portion of such Owner's Residential Lot that Owner is responsible to maintain" to the POA's satisfaction. Appellants' Br. at 6-7 (quoting R. p. 70). The word "exterior" does not appear in § 3.8. Rather, the broad phrase "any portion" means what it says.

The POA then offers its own gloss on § 3.8, claiming that it was intended to allow the POA to remedy "dilapidated exterior[s]" that could lower property values. POA Br. at 11. The POA does not cite anything in the record supporting its incongruous interpretation. The POA indisputably controlled almost all aspects of exterior maintenance. Not only is the POA's reading of § 3.8 textually unsupported, it would also render § 3.8 almost entirely superfluous.

Section 3.5: Respondents note that CCR's § 3.5 gives owners an "exclusive right" to maintain unit interiors. Kalsbeek Br. 3, 18 (citing R. p. 540); POA Br. 4-5 (citing R. p. 69), 30.[14] That right, however, is subject to § 3.8. At best for Respondents, that § 3.5 gives owners an exclusive right, and then § 3.8 limits that right, creates ambiguity for the jury to resolve.

Section 3.6: The POA claims that CCR's § 3.6 gives the POA an easement for access to unit exteriors only. POA Br. at 4. Actually § 3.6 gives the POA: "an irrevocable easement for purposes of access to and upon each Residential Lot and Four Plex . . . ." R. p. 69. There is no limitation to unit exteriors.

POA-FRPM Agreement: The POA claims that the POA-FRPM Agreement limited the scope of FRPM's responsibilities to the POA to "day-to-day administrative duties . . . for common areas." POA Br. at 5, 19 (citing R. p. 98-102, 141). However, ¶ 3.1 of the POA-FRPM

[14] Identical copies of the CCR's appear in the Record at 64 to 96 and 535 to 567.

Agreement authorized the POA to select contractors performing maintenance at "the property," and in ¶ 3.4 FRPM contracted with the POA to take action "reasonable and appropriate in the event of any emergency . . . which may . . . cause injury to tenants and occupants of the Property." R. p. 98-99. Only unit interiors — not unit exteriors or common areas — have tenants or occupants. Therefore — to the extent that the Agreement is relevant to the POA's authority under the CCR's — the Agreement confirms the POA's authority.

Switzer-FRPM Agreement: Similarly, the POA relies on the fact that the Switzer-FRPM Agreement gave FRPM authority to repair and maintain Mr. Switzer's units on his behalf — in some instances without prior approval. POA Br. at 5 (citing R. p. 104-13). Mr. Switzer's control does not disprove the POA's parallel control over the three matters at issue in this appeal.

b. Honor system limitations are not real limitations.

The POA argues that CCR's § 3.8 included procedural limitations on its unfettered discretion to deem an owner's maintenance unsatisfactory and to repair, maintain, and restore any portion of a Four-Plex, including through its agent FRPM. POA Br. at 11. Specifically, the POA Board was supposed to formally vote and hold a hearing before taking action pursuant to § 3.8. But no provision allowed an owner to oppose the POA Board's actions on the grounds that Board had not formally voted and held a hearing. Thus, nothing more than the honor system limited the Board's authority here.

This case exemplifies that the honor system is not a real limitation on an entity's power. For example: Mr. Kalsbeek insisted that there was "absolutely nothing about owners' approval" in his Procedures for hard-wired CO detector installation. R. p. 415 at Transcript p. 14, Ll. 2-18.

Arguably, Mr. Kalsbeek should have put his Procedures to a formal POA Board vote and then afforded owners a hearing before imposing his Procedures. But, he didn't, and FRPM followed his Procedures. It would be a remarkable and unfortunate development in Idaho law if this Court held that a party could avoid liability by the simple expedient of failing to adhere to proper protocol when making tortious decisions.

C. Respondents owed duties based on their actual control over: (1) hard-wired CO detector installation; (2) professional preventative maintenance; and (3) warnings to owners and tenants.

1. The POA owed premises liability duties.

a. Premises liability duties are proportional to control over the premises.

The POA asserts without citing *any* supporting authority that an entity cannot owe a partial premises liability duty. POA Br. 15. The POA does not even attempt to address the cases that Appellants cited, which hold that premises liability duties are proportional to a party's control. Appellants' Br. at 15-16. By failing to cite any contrary authority, the POA has waived this issue. *See Pocatello Hosp.*, 157 Idaho at 743, 339 P.3d at 1147.

b. The POA had control over dangerous conditions.

The POA claims that control over detector installation, maintenance, and warnings are not valid bases for imposing premises liability duties, because these are not "dangerous conditions or activities on the property." POA Br. at 16. According to the POA, only the water heater itself was a dangerous condition. *Id.* This argument is perplexing. A hard-wired CO detector would have protected Ms. Halowell and Mr. Forbush from being poisoned by the water

heater. Professional preventative maintenance, to stop the water heater from clogging and emitting CO, would also have prevented this poisoning. So too would an effective warning to Mr. Switzer or Ms. Kipper. Thus, even though the POA did not assert the authority to replace the water heater, it controlled relevant aspects of the premises that could have protected against harm caused by the water heater.

c. Regardless of whether the POA had rightful control, it had actual control.

The POA then returns to its familiar refrain that — regardless of the fact that it actually exercised control over unit interiors, it supposedly owed no duty because it lacked rightful control. POA Br. at 16-19. As support, the POA cites *McDevitt v. Sportsman's Warehouse, Inc.*, 151 Idaho 280, 255 P.3d 1166 (2011). POA Br. at 17-18. However, in *McDevitt* there was no evidence that the defendant store exercised any actual control over the sidewalk (the defective premises in that case). Although the store sometimes parked hot dog stands and display trailers on the sidewalk, it was only with the owner's approval. *Id.* at 286, 255 P.3d at 1172.

Here, in contrast, the POA implemented written Procedures specifying a piecemeal schedule for hard-wired CO detector installation that — according to Mr. Kalsbeek himself — included "absolutely nothing about owners' approval" and were "not optional." R. p. 415 at Transcript p. 14, Ll. 2-18; R. p. 418 at Transcript p. 98, L. 25 to p. 99, L. 1. Moreover, the POA did not seek owner input on the decision of whether to hire a professional plumber to perform preventative maintenance. And, furthermore, the POA actively prevented FRPM from sharing warnings with owners. Thus, in contrast to *McDevitt* — where the owner exercised full control

over the sidewalk, and all actions that the defendant store took were with the owner's permission — here the POA exercised control without the owners' permission.

d. *Stiles* confirms the POA's premises liability duties.

The POA suggests that, pursuant to this Court's recent decision in *Stiles v. Amundson*, 160 Idaho 530, 376 P.3d 734 (2016), only Ms. Kipper owed any duty. POA Br. at 19-20. Because the POA had control over relevant aspects of the premises and knowledge of the CO threat, whereas Ms. Kipper did not, *Stiles* confirms that the POA owed premises liability duties.

Ms. Kipper lacked control over relevant aspects of the premises. Her lease forbade her from making repairs or altering the premises in any way. R. pp. 192 at ¶ 39, 197 at ¶ 82. There is no evidence that Ms. Kipper (unlike Mr. Kalsbeek and the POA) exercised control regardless of what her lease said. Moreover, Ms. Kipper was not aware of an ongoing CO threat. She was told that her water heater was being replaced and reasonably believed any threat had been eliminated. Appellants' Br. at 13 n.9.

Stiles adopted the Court of Appeals' reasoning in *Robinson v. Mueller*, 156 Idaho 237, 322 P.3d 319 (Ct. App. 2014) — including quoting with approval that "**it is the entity having control over the property that bears the burden of warning social guests and licensees of dangerous conditions on the property**." *Stiles*, 160 Idaho at 533, 376 P.3d at 737 (emphasis added) (quoting *Robinson*, 156 Idaho at 240, 322 P.3d at 322).

A rental agreement typically shifts control over repairs from landlords to tenants. *Id.* Moreover, tenants typically are better able to detect hazards on the premises than are landlords. *Id.* at 533-34, 376 P.3d at 737-38. Because tenants typically are more aware of hazards and

better able to remedy them, typically premises liability duties shift from landlords to tenants. *Id.* This is not always the case. "The exception to this reasoning is where the landlord created the hazard him or herself." *Id.* at 534, 376 P.3d at 738. In such instances, both the landlord and tenant may simultaneously owe premises liability duties:

> Either a tenant, or a landlord, **or both**, may be liable to a third party for injuries resulting from negligent repairs **or failure to repair**. Even in the absence of a specific lease provision, and with no controlling statute requiring him to make repairs, if a landlord voluntarily undertakes repairs he is bound to use reasonable and ordinary care or skill in the execution of the work.

Id. (quoting *Harrison v. Taylor*, 115 Idaho 588, 596, 768 P.2d 1321, 1329 (1989)).

Finally, in Idaho premises liability law the word "owner" is used broadly — not to indicate the individual who owns the property in fee simple, but rather to indicate the individual or individuals exercising control over the property. *See id.* at 533, 376 P.3d at 737 ("[A] tenant or lessee, having control of the premises is deemed, so far as third parties are concerned, to be the owner . . . ." (quoting *Harrison*, 115 Idaho at 596, 768 P.2d at 1329)); *Robinson*, 156 Idaho at 240, 322 P.3d at 322 (quoting same).

Thus, *Stiles* holds that:

(i) more than one party may owe premises liability duties for a single premises;

(ii) one need not own the premises in fee simple to owe premises liability duties;

(iii) awareness of and ability to remedy a hazard result in premises liability duties; and

(iv) creating a hazard — including by failure to make repairs — results in premises liability duties.

Stiles supports that the POA owed premises liability duties resulting from its awareness, ability to remedy, and creation of hazards. It is irrelevant that the POA did not own the premises in fee simple or that Mr. Switzer also owed premises liability duties.

e. Policy considerations militate in favor of imposing a duty on the POA.

The POA's final argument is that imposing a premises-liability duty here would have a "chilling effect" on similar conduct by other property owners' associations. POA Br. at 22. If so, good. The central purpose of tort law is to deter harmful conduct. *See Jones v. Reagan*, 696 F.2d 551, 554 (7th Cir. 1983) ("[I]t has long been one view that deterrence, accomplished through the setting of standards of conduct and the punishment by means of damage awards . . . is the main function of tort law.") (per Posner, J.). Here, the POA dominated FRPM's actions, preventing it from taking specific steps that would have protected Ms. Halowell from a severe brain injury and Mr. Forbush from being killed. It is proper to deter such conduct by holding Mr. Kalsbeek and the POA accountable for the damages they caused.

2. Respondents owed duties resulting from their voluntary undertakings.

The parties agree that both an undertaking and reliance are necessary to impose a duty under a voluntary-undertaking theory.

a. Respondents engaged in voluntary undertakings.

The POA observes that a "non-response," standing alone, is insufficient to create a voluntary undertaking. Specifically, the POA quotes Appellant's comment that "Mr. Kalsbeek

never said that he lacked the power to make this decision [i.e. whether to immediately install hard-wired CO detectors in all units]." POA Br. at 28 (quoting Appellants' Br. at 21).

If Mr. Kalsbeek's non-response were the only evidence of a voluntary undertaking regarding hard-wired CO detector installation, the POA would have a valid point. However, the POA ignores that Mr. Kalsbeek created written Procedures for when hard-wired CO detectors would be installed, revised those written Procedures (choosing to leave the piecemeal installation requirements in place), and then orally re-affirmed his Procedures at the October 25 meeting over Ms. Gaertner's suggestion to fast-track detector installation. Thus, Mr. Kalsbeek affirmatively undertook to control hard-wired CO detector installation.

b. FRPM relied on Mr. Kalsbeek and the POA to make decisions — a direct result of Mr. Kalsbeek and the POA's assertion of control.

A recurring theme throughout the POA's argument is that FRPM cannot possibly have relied on the Mr. Kalsbeek and the POA because FRPM owed a duty to repair and maintain unit interiors, including water heaters. Based on the disputed facts, a reasonable juror could find that Mr. Kalsbeek and the POA used their financial leverage — as well as outright bullying by Mr. Kalsbeek — to create a relationship where FRPM needed Respondents' approval to act. Respondents created this reliance, and must abide by the consequences.

3. The POA can be held liable for the acts and omissions of its agent, FRPM.[15]

a. Appellants are not asserting, and have never asserted, apparent/ostensible (rather than actual) agency. The POA's analysis of that theory is a red herring.

The POA claims that Appellants conceded actual agency and are pursuing apparent/ostensible agency instead. POA Br. at 32. Wrong. Appellants have always argued — and still maintain — that the POA's actual control over FRPM created an actual agency relationship, which cannot be avoided by any contractual disclaimer. R. pp. 358-59; Appellants' Br. at 24-25.[16]

b. That FRPM was not a dual agent with respect to "grandfathered" units is irrelevant to FRPM's dual agency in Apartment 4624.

The POA notes that FRPM took no action in the few units where, due to the "grandfather" clause in § 6.6A of the CCR's, R. p. 96, there was a different property manager.

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[15] Appellants pursued their agency theory against the POA only. Mr. Kalsbeek's discussion of the agency issue is superfluous.

[16] Appellants' opening brief cited five cases for the proposition that a contractual disclaimer is not dispositive when the facts show an agency relationship. Appellants' Br. at 24-25. The POA notes that in *one out of the five cases* the underlying theory in which this proposition of law was discussed was apparent/ostensible agency. POA Br. at 33 (discussing *Barefoot v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 424 F.2d 1001, 1005 (10th Cir. 1970)). The POA ignores that *the other four cases* all discussed this proposition of law in the context of actual agency. *See* Appellants' Br. at 24-25, citing *In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d 56, 74 (S.D.N.Y. 2009) (Clearly analyzing existence of actual agency, not apparent/ostensible agency: "Here, a genuine factual issue exists as to whether ESM Group and ESMT agreed that ESMT would act on ESM Group's account."); *Tomlinson v. G.E. Capital Dealer Distrib. Fin., Inc.*, 624 So. 2d 565, 567 (Ala. 1993) (clearly analyzing existence of actual agency, not apparent/ostensible agency; never even using words "apparent" or "ostensible"); *Hylton v. Koontz*, 532 S.E.2d 252, 257-58 (N.C. Ct. App. 2000) (same); *Thornton v. Ford Motor Co.*, 297 P.3d 413, 419 (Okla. Civ. App. 2012) (Stating: "[i]f the facts show actual control by the principal, an agency is established regardless of the contract language" in section titled "Actual Authority.").

POA Br. at 34. According to the POA, if FRPM were a dual agent, it would have taken action in the "grandfathered" units too. This is not necessarily so. It makes sense that FRPM was a dual agent for those units where it managed all aspects of the unit, but not a dual agent for those units where a different property management company was separately hired to mange the unit interior. The POA has not refuted dual agency with respect to Apartment 4624 as a matter of law.

4. Mr. Kalsbeek can be held individually liable for his own tortious conduct.

a. A corporate officer can be held liable for specific direction of, active participation in, and knowing acquiescence to tortious conduct. It is *not* required that the officer act outside of the scope of their duties.

Mr. Kalsbeek misunderstands the standard for when a corporate officer or director can be held liable for his or her own acts or omissions. The standard is not that the officer or director must act outside the scope of his or her duties. Rather, it is sufficient that the officer or director specifically directs, actively participates in, or knowingly acquiesces to tortious conduct. *See* Appellants' Br. at 26 (quoting *VFP VC v. Dakota Co.*, 141 Idaho 326, 334, 109 P.3d 714, 722 (2005); *Eliopulos v. Knox*, 123 Idaho 400, 404–05, 848 P.2d 984, 988–89 (Ct. App. 1992))

Idaho's common law is fully compatible with I.C. § 30-30-406, which provides: "A member of a corporation is not, as such, personally liable for the acts, debts, liabilities or obligations of the corporation." Thus, a member of a corporation is not vicariously liable for the corporation's torts merely because he or she is a member. Rather, specific direction, active participation, or knowing acquiescence is required.

Mr. Kalsbeek's protestations that he did not participate in a voluntary undertaking "aside and apart from his role as an officer of the POA," Kalsbeek Br. at 20, and that he did not

personally attempt to install a detector or repair a water heater, *id.* at 22-23, are irrelevant. There is ample evidence that Mr. Kalsbeek specifically directed, actively participated in, and knowingly acquiesced to tortious conduct. For example, Mr. Kalsbeek promulgated Procedures for the piecemeal installation of hard-wired CO detectors, objected to hiring a professional plumber to perform preventative maintenance, and specifically forbade FRPM from sending any adequate warnings. Appellants are not seeking to hold Mr. Kalsbeek vicariously liable for the POA's torts — rather, they are seeking to hold him directly liable for his own torts.

b. Whether Mr. Kalsbeek is immune is an issue for the District Court to resolve in the first instance. But, to the extent this Court reaches this issue, it would be improper to grant summary judgment as the material facts are disputed.

Mr. Kalsbeek correctly notes that the District Court did not rule on his immunity arguments. Kalsbeek Br. at 26. Typically, when a district court does not rule on an issue — particularly one that is factually intensive — this Court remands for the district court to determine that issue in the first instance. *See Boise Tower Associates, LLC v. Hogland*, 147 Idaho 774, 784, 215 P.3d 494, 504 (2009) (remanding for district court to resolve issues that were not addressed in its grant of summary judgment); *Hill v. Sligar*, 128 Idaho 858, 861, 920 P.2d 74, 77 (1996) (stating that it is "[i]n accordance with proper appellate procedure" not to address issue that district court did not reach below).

It is not surprising that the District Court declined to address Mr. Kalsbeek's immunity argument, given the undeveloped state of the record. As previously noted, Mr. Kalsbeek's only support for his affirmative defense of immunity was an affidavit that copied the elements of I.C.

§ 30-30-623 verbatim rather than setting forth any evidentiary facts. Appellants moved to strike Mr. Kalsbeek's affidavit on that basis.[17] R. pp. 660-61; R. Aug. pp. 1-6, 15-19. The District Court never ruled on Appellants' Motion to Strike. The District Court must decide this issue on remand.

5. Respondents' finger-pointing at others does not absolve them of their own duties.

Respondents attempt to shift the blame away from themselves to tenant Adra Kipper, owner Matthew Switzer, and FRPM — but fail to argue that any intervening, superseding cause that absolves Respondents of all liability. *See Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 302, 796 P.2d 506, 511 (1990) (discussing superseding cause defense). "It has long been the law in Idaho that there can be more than one proximate cause of an injury." *See Idaho Dep't of Labor v. Sunset Marts, Inc.*, 140 Idaho 207, 211, 91 P.3d 1111, 1115 (2004). At most, Respondents' arguments go to fault-apportionment, which is a factually intensive matter for the jury.[18]

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[17] Mr. Kalsbeek claims — citing only his own affidavit — that it is "undisputed" that he acted in good faith, with ordinary care, and in a manner he reasonably believed was in the best interests of the owners and the POA. Kalsbeek Br. at 28. Appellants never stipulated that the conclusory statements in Mr. Kalsbeek's affidavit were true. Rather, Appellants moved to strike the affidavit. Appellants also argued that evidence in the record disproves Mr. Kalsbeek's affidavit. R. pp. 661-62. Therefore, Mr. Kalsbeek's assertion that Appellants "chose not to rebut Mr. Kalsbeek's affidavit below" is false. Kalsbeek Br. at 28.

[18] The jury may apportion fault to a party (or nonparty) only if all the elements of that entity's negligence are established. *See Van Brunt v. Stoddard*, 136 Idaho 681, 687, 39 P.3d 621, 627 (2001). Whether Ms. Kipper, Mr. Switzer, or FRPM were negligent, and if so to what extent, are hotly disputed factual questions.

For example, Respondents attempt to blame Mr. Switzer for failing to replace his water heaters. *See, e.g.* Kalsbeek Br. at 9. The jury might well turn the blame back on Mr. Kalsbeek

III. CONCLUSION

Because numerous disputed issues of fact preclude summary judgment, Appellants respectfully request that this Court reverse and remand so that the jury can resolve the claims and defenses.

Dated this 27th day of September, 2016.

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and the POA. Mr. Kalsbeek commanded FRPM maintenance supervisor Sheila Thomason not to reveal the Ben Davis Letter to owners such as Mr. Switzer. R. p. 406 at Dep. p. 140, L. 18 to p. 141, L. 7. The Ben Davis Letter warned of the imminent risk of death due to CO poisoning. R. pp. 701-02. Had Mr. Switzer received the dire Ben Davis Letter, he might well have replaced his water heaters.

Another example is Respondents' criticism of Ms. Kipper for not replacing the batteries in the temporary CO detector that FRPM gave her. POA Br. at 21-22 & n.4; Kalsbeek Br. at 8, 10. Strangely, the POA cites lease provisions dealing with *smoke* detectors — not temporary CO detectors — to claim that Ms. Kipper had a duty to replace the batteries. POA Br. at 22 n.4 (citing R. pp. 192-93 at ¶¶ 39(1) and (2), ¶ 42). Respondents omit that Ms. Kipper was told that the detector was merely temporary, "for safety precautions until your water heater can be replaced next week." R. p. 239. Ms. Kipper was even instructed not to attach the temporary detector to her wall. *Id.* And, although it was merely temporary, Ms. Kipper nonetheless replaced the batteries three times before failing to do so immediately on a fourth occasion. R. Aug. p. 41 at Dep. p. 42, L. 19 to p. 45, L. 11. The factual disputes run deeper, but the point is obvious: summary judgment cannot be based on an apportionment of fault.

CERTIFICATE OF SERVICE

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

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