COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO.: PLCV2010-01385-B

MICHAEL KELLEY, SR.,
AND MICHAEL KELLEY, JR.,
Plaintiffs

v.

THOMAS J. PETERSON,
Defendant.

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO.: PLCV2010-01386-B

EDWARD A. HICKS,
Individually and as Parent and Next Friend of
ALEXANDER HICKS,
Plaintiffs,

v.

THOMAS J. PETERSON,
Defendant.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiffs in the above entitled actions, Michael Kelley, Sr. ("Kelley"), Michael Kelley, Jr., and Edward A. Hicks ("Hicks"), Individually and as Parent and Next Friend of Alexander Hicks (collectively "Plaintiffs"), submit this memorandum of law in support of their opposition to the motion of defendant Thomas J. Peterson ("Peterson" or "Defendant") for

summary judgment. As more fully set forth below, this Court should deny Defendant's motion because there exist numerous genuine issues of material fact and the undisputed facts do not entitle Defendant to judgment as a matter of law.

1. Statement of the Case.

Plaintiffs rely on the facts set forth in their responses to Peterson's Statement of Undisputed Facts and Plaintiffs' Statement of Additional Material Facts, set forth in the parties' Joint Statement of Facts ("*SOF*"), filed herewith. The following is a summary of those facts for the Court's convenience.

On March 7, 2008, Kelley and Hicks were standing on scaffolding that was approximately twenty feet above the ground, putting clapboards on the back of a house that was being constructed for defendant Peterson. *SOF* ¶146. As they were standing on the scaffolding, one of the wooden pump jacks that supported the staging platform broke, causing them to fall to the ground below and suffer serious personal injuries. Id.

Kelley and Hicks were carpenters who worked for Malcolm Knox ("Knox") d/b/a M K Construction. *SOF* ¶147. Knox had been hired by Peterson to do the carpentry work for the framing, roofing and walls of the house. Id. Neither Kelley nor Hicks nor any of the other employees who worked for Knox at the site had received any formal training in carpentry, scaffold erection or safety issues. *SOF* ¶¶149-59. Knox's employees were not licensed contractors. Id. They had not attended OSHA courses or received any formal safety training. Id. They had not received any instruction from Knox regarding carpentry, the use of scaffolding or safety. Id. They were all paid in cash and they never received W-2's or any documentation reflecting their wages. Id.

Peterson had decided that as an additional cost saving measure he would act as project supervisor/general contractor for the project. *SOF* ¶¶162, 164. He did not hire a general

contractor to oversee the work, which involved the demolition and construction of a new 4,634 square foot home. *SOF* ¶¶165, 178, 179, 196. Although Knox had acted as a general contractor on other projects, on this job Peterson did not want to pay Knox the mark-up to act as general contractor. *SOF* ¶¶162-64, 173, 191. Knox was hired just to do the carpentry work. *SOF* ¶¶170, 178, 180, 186. Accordingly, Peterson hired all the contractors directly, arranged for all the supplies and materials, and was on the site virtually every day to oversee and direct the work. *SOF* ¶¶160-61, 167-68, 183, 187, 206-07, 209-10, 213-17, 219. On his application for a building permit, Peterson listed "property owner" as the "builder." *SOF* ¶196. He also stated in an affidavit to the Department of Industrial Accidents that he was "doing all the work himself." *SOF* ¶195. The Building Permit issued by the town listed Peterson as the "contractor." *SOF* ¶197. Peterson also submitted documents to the Town of Barnstable certifying that he was acting as "project supervisor." *SOF* ¶¶199-200, 203. The permits posted on the site as well as a sign all listed Peterson as the "builder." *SOF* ¶¶198, 201.

Peterson retained ultimate control and responsibility for how the work was done and for safety on the project. See generally, *SOF* ¶¶220-54. For example, if Peterson was dissatisfied with any aspect of Knox's work, he would tell Knox or Knox's laborers to change it. He had Knox's workers replace clapboards, move walls and change other elements of the work. *SOF* ¶¶221-233. Peterson admitted that he oversaw the entire project, coordinated all trades, hired all the contractors, supplied all the materials and undertook responsibility to see that the project was done properly and safely. *SOF* ¶222. Knox's employees also testified that it was Peterson, not Knox, who was regularly at the site directing the work. *SOF* ¶184. They testified that Peterson would walk around the house with a checklist and make sure that the house was built in accordance with specifications and the contracts. *SOF* ¶¶223,238. Peterson had the final say and approved the work being done. *SOF* ¶227. He was the only person carrying out the

responsibilities of a general contractor/project supervisor. *SOF* ¶¶230, 245-48. According to the witnesses, as well as Peterson himself, he was "going around to make sure everybody was doing what they should be doing." *SOF* ¶¶231-32, 235, 237-39, 242, 244. There was no one else on the site other than Peterson supervising safety at the site. *SOF* ¶¶245-54. If there was a problem, the workers were told to go to Peterson. *SOF* ¶229. He was there to make sure that everything was "done properly." *SOF* ¶222.

The scaffolding at issue is what is known as a wooden pump jack scaffolding and was visibly dangerous. See generally *SOF* ¶¶255-99. The poles which support the scaffolding consisted of two 2 x 4's that are nailed together to create a 4 x 4 wooden post. *SOF* ¶148. The wood that was used in this case to erect the posts was "old, bowed, rotted." *SOF* ¶289. See also *SOF* ¶¶255-56, 258, 260, 263-64, 275, 277, 287, 292, 296. The posts were about 10 – 12 years old and had been sitting out in the back of Knox's yard, exposed, for years. *SOF* ¶¶255, 276, 281. They were transported from Knox's yard, still nailed together, over the roadway to the site and just hoisted to the building. *SOF* ¶¶267, 281, 291. One of Knox's workers cut off some of the rotted portions of the wood at the site. *SOF* ¶¶255, 278, 282. However, what remained was still old, weathered and deteriorated. *SOF* ¶¶255-56, 258, 260, 263-64, 275, 277, 283, 287, 289, 292, 296. The poles that broke had also previously been hit by a backhoe and just pushed back into place by the backhoe. *SOF* ¶¶284-86, 294, 298. In addition, no fall protection was being used. *SOF* ¶¶257, 259, 270. These dangers were plainly visible to Peterson. *SOF* ¶¶261, 279, 280, 288, 290.

Although Peterson had retained control over the project and responsibility for safety at the project, he failed, despite notice of the dangerous conditions that existed, to take any measures to see that the work was done safely and under proper supervision. As a result, on March 7, 2008, while Kelley and Hicks were working on this dangerous scaffolding without fall protection, one of

the wooden pump jack poles broke, causing Kelley and Hicks to fall approximately 20 feet to the ground below.

OSHA immediately investigated the accident and found numerous violations at the site, all of which were classified as "serious." *SOF* ¶301. These violations included the lack of trained employees who could recognize and avoid fall hazards, the failure to have a competent person on site who could inspect the scaffolding for visible defects, the failure to erect or dismantle scaffolding under proper supervision and direction by a competent person qualified in scaffolding erection, the failure to properly secure the poles of the scaffolding to the structure, the failure to have mending plates where the poles were joined at the joints, and the failure to have proper fall protection. *SOF* ¶301.

2. Argument.

2.1 Introduction.

The summary judgment evidence creates genuine issues of material fact, precluding summary judgment in favor of Peterson on liability. First, Peterson is liable because he retained meaningful control over how Knox and his employees did their work. Second, Peterson is liable to Kelley and Hicks under a theory of negligent retention. Although he knew or should have known that Knox was exposing his workers to serious dangers by having them work on dangerous scaffolding without fall protection, Peterson continued to employ Knox on the job, thereby exposing Kelley and Hicks to continued dangers.

2.2 The standard for summary judgment.

Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[1] Once the moving party has made an

[1] Mass.R.Civ.P. 56. See, also, SCA Services, Inc. v. Transportation Insurance Company, 419 Mass. 528, 531 (1995); Massachusetts Hospital Association, Inc. v. Department of Public Welfare,

initial showing that there is no genuine issue of material fact, the non-moving party must respond by submitting evidence of specific facts which evidence the existence of such a genuine issue.[2]

In the present case, the Court should deny Peterson's motion for summary judgment because there exist genuine issues of material fact and the undisputed facts do not entitle Peterson to judgment as a matter of law.

2.3 Because he retained sufficient control over the work performed by contractor Knox, including safety issues, Peterson had a responsibility to exercise that control so as to protect the safety of persons on the worksite, like Kelley and Hicks, and is liable for failing to do so.

2.3.1 The retained control exception.

As a general rule, "if the employer [of an independent contractor] retains no control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it'." Corsetti v. The Stone Company, 396 Mass. 1, 10 (1985), quoting Restatement (second) of Torts, §409, com "b". However,

> if the employer retains the right to control the work in any of its aspects, including the right to initiate and maintain safety measures and programs, he must exercise that control with reasonable care for the safety of others, and he is liable for damages caused by his failure to do so. This principle is set forth in Restatement (Second) of Torts § 414, which provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

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419 Mass. 644, 649 (1995); Marenghi v. Mobil Oil Corp. , 416 Mass. 643, 646-47 (1993); Greenery Rehabilitation Group, Inc. v. Antaramian, 36 Mass. App. Ct. 73, 75 n. 4 (1994).

[2]SCA, 419 Mass. at 531; Marenghi, 416 Mass. at 646, 647; Pederson v. Time, Inc., 404 Mass. 14, 17 (1989); Dattoli v. Hale Hospital, 400 Mass. 175, 178 (1987); Greenery, 36 Mass. App. Ct. at 75 n. 4; Key Capital Corporation v. M & S Liquidating Corporation, 27 Mass. App. Ct. 721, 728 (1989).

> One, such as Stone, who employs an independent contractor, "may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in [§ 414] unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others." Id., comment a. "The rule stated in [§ 414] is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself." Id., comment b.

Id. at 10-11. (Emphasis added, footnote references omitted).[3]

Notably, "[w]hether an employer has sufficient control over part of the work of an independent contractor to render him liable under § 414 is a question of fact for the jury." Corsetti, 396 Mass. at 11.

Even a small amount of retained control is sufficient to trigger liability on the part of one who employs an independent contractor. As noted by the Corsetti Court, the control retained need not be such as would establish a master/servant relationship rendering the employer vicariously liable. Whether an employer has retained sufficient control, "should not be determined on summary judgment unless, viewing the evidence in the light most favorable to the plaintiff, the undisputed material facts demonstrate, as a matter of law, that the defendant did not exercise any 'meaningful control, however minimal, over the subcontractor'."[4] It is "meaningful control,

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[3] See also Kelly v. Foxboro Realty Assoc., 454 Mass. 306, 316-17 (2009); Dilaveris v. W.T. Rich Co., Inc., 424 Mass. 9, 11 (1996); Kostrzewa v. Suffolk Construction Co., 73 Mass. App. Ct. 377, 379 (2008).

[4] Kostrzewa, 73 Mass. App. Ct. 377, 379 (2008). (Emphasis added). See also Melo v. Archdiocese of Boston, 2012 WL 360503, *1 (Mass. App. Ct. 2/6/12) (unpublished Rule 1:28 opinion).

however minimal" that is the " 'critical factor' in determining whether [an owner] owe[s] a duty of care to [an employee of an independent contractor]."[5] Further, the control "need not descend to the last detail of method or operation for the imposition of liability to result...."[6]

At least a jury issue as to retained control is created by evidence that the plaintiff injured workers, and their independent contractor employer, understood that they were to look to the defendant and follow defendant's decisions with respect to construction related issues.[7]

On the other hand,

> it is not enough, that [the employer] had merely a general right to order the work stopped or resumed, to inspect it progress, or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such retention of a right of supervision that the contractor is not entirely free to do the work his way.

Restatement (second) of Torts, §414 com. "c".[8]

The Massachusetts Appeals Court has made clear that summary judgment for the employer of an independent contractor should be denied, even where the defendant owner or general contractor has retained very little control over the independent contractor's work. In Cheschi v. Boston Edison Co., 39 Mass. App. Ct. 133 (1995), the Appeals Court held that a jury issue existed as to the property owner's retained control, despite the facts that: the contract required the

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[5] Easler v. Delta Airlines, Inc., 2011 WL 5024196, *1 (D. Mass. 10/21/11).
[6] Paradoa v. CAN Ins. Co., 41 Mass. App. Ct. 651, 654 (1996); Cabreira v. Verizon New England, Inc., 2007 WL 1829382, *4 (6/14/07).
[7] See Callender, 2007 WL 2705529 (holding that where plaintiff's employer viewed defendant company's president as someone from whom it would accept direction, there was at least an issue of fact as to whether defendant company was a general contractor and had duties based on retained control under Corsetti).
[8] See also Melo, 2012 WL 360503, *1; Foley v. Rust Intern., 901 F.2d 183, 184 (1st Cir. 1990); Lopez v. Equity Office Management, LLC, 597 F. Supp.2d 189, 193 (D. Mass. 2009); Kelliher v. Brandeis University, 2008 WL 1932096, *2 (Mass. Super. 4/24/08); Bayliss v. Hannan Construction Corp., 2007 WL 738925, *2 (Mass. Super. 2/14/07); Cabreira v. Verizon New England, Inc., 2007 WL 1829382, *4.

contractor to meet performance standards for construction; the contractor had a comprehensive construction safety program; the contractor had safety personnel on site; the contractor held weekly safety meetings; and the contractor controlled the details of construction work. The owner neither oversaw nor directed the work and did not inspect the area where the injury occurred. Further, the owner had no employee stationed there. The Court focused on the facts that the owner maintained overall oversight and overall direction of project; each work order was subject to owner's instructions and prior approval concerning safety issues; and the owner had the right to shut down the site due to safety concerns.[9]

In addition, before liability can be imposed on the employer of an independent contractor it must be shown that the employer knew or should have known of the dangers posed by the contractor's performance and that the employer had the opportunity to use its retained control to remedy the danger.[10] In this regard, an owner who is regularly on site while work is progressing can reasonably be inferred to know of safety violations, at least violations which are obvious.[11]

2.3.2 The evidence of Peterson's retained control creates at least a genuine issue of material fact precluding summary judgment.

According to Peterson, he is entitled to summary judgment because, he asserts, it is undisputed that Knox, not Peterson, was responsible for safety at the work site, that Peterson did not oversee or participate in Plaintiffs' work and that Peterson was unaware that the scaffolding

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[9] Cheschi v. Boston Edison Co., 39 Mass. App. Ct. 133, 135-38 (1995).
[10] Corsetti, 396 Mass. at 10-11; Lopez v. Equity Office Management, LLC, 597 F. Supp.2d 189, 193 (D. Mass. 2009).
[11] Kostrzewa v. Suffolk Construction Co., 73 Mass. App. Ct. 377, 382 (2008) ("There was evidence that the asbestos workers regularly moved the scaffolding without dismounting. This, combined with the testimony that it was not unusual for Suffolk employees to be looking through the viewing windows into the containment areas, permitted an inference that Suffolk knew or should have known that scaffolding was not being used safely and that Suffolk, as a result, was negligent in supervising the safety of the worksite.")

was in any way defective, dangerous or unsafe. However, these and other material facts are very much in dispute.

a. *Peterson acted as general contractor for the work, supervised the entire job, and was responsible for safety at the worksite, and provided direction as to the operative detail of the work done by Knox's employees.*

Ample evidence supports a finding that Peterson, not Knox, was the general contractor and construction supervisor for the project, and was responsible, among other things, for ensuring that all subcontractors were performing their work safely. Peterson himself acknowledges that it was he and not Knox who was acting as general contractor on the project. *SOF* ¶177. Peterson testified that he was aware that he was assuming the responsibilities of a supervisor and was ultimately responsible. *SOF* ¶234. Peterson also repeatedly identified himself as "project supervisor" or "builder" or "contractor" in documents he filed with town Boards and Commissions seeking approvals for the project. *SOF* ¶¶192-200.

According to Peterson, he was at the project to make decisions "as there were a lot of decisions that had to be made every day". *SOF* ¶235. Peterson acknowledged that he oversaw the entire project, coordinated all of the trades, hired all of the contractors, supplied all of the materials and undertook responsibility to see that project was done properly and safely. *SOF* ¶222. According to Harley Sentell, Peterson would walk around the site with a checklist to check off things that had gotten done and what still needed to be done. Sentell also testified that Peterson "was overseeing the whole project". *SOF* ¶226. According to Sentell, Peterson was there every single day telling Malcolm what he wanted done. *SOF* ¶239.

It was Peterson who directly hired all of the contractors who worked on the project, including not only Malcolm Knox but plumbers, electricians, HVAC, landscapers, tilers, and all of the other trades involved. *SOF* ¶160. It was also Peterson who supplied the materials. *SOF* ¶161. Peterson was coordinating all these trades. *SOF* ¶168. According to Sentell, Peterson would talk

with each of the contractors. Peterson was the project supervisor overseeing all the trades, not Knox. *SOF* ¶¶225-26. Other than Peterson there was no general contractor or construction supervisor. *SOF* ¶¶165, 179.

Knox clearly was *not* the general contractor or construction supervisor for the project, as Peterson now argues. Peterson had hired Knox as a contractor to do the framing and siding and roofing, not to act as general contractor or project supervisor. Peterson testified that he hired Knox just to do the carpentry work at the project, that he was not hired as general contractor or construction supervisor, and was not acting as such. *SOF* ¶180. Knox was just there to do the structure of the building. *SOF* ¶180.

While Knox often acted as a general contractor in charge of an entire project, that was not the case here. On most projects that Knox did, he would hire the subcontractors, but not in this project, nor did Knox consider it his responsibility to make sure that the other contractors were doing their work properly. *SOF* ¶176. Rather, the responsibility for supervising the project was left to Peterson. *SOF* ¶163. Peterson decided that he would act as general contractor and project supervisor for the project. *SOF* ¶162.

The contract between Peterson and Knox d/b/a MK Construction is clear. MK Construction was to supply labor only to complete the framing of the house, apply trim on brakes, soffits, facias and install and trim windows and doors. *SOF* ¶170. In addition, MK Construction was to supply labor only to complete the exterior siding, install interior trim and exterior roofing. *SOF* ¶170. For these services, Knox was paid a total of $114,500. *SOF* ¶170. On other jobs where Knox did act as general, he had a contract that said so and he would get a percentage of even what was paid to subcontractors. That was not the case here. *SOF* ¶174. Knox testified that Peterson actually wanted him to be the general contractor but did not want to pay him to be the general contractor. Peterson did not want to give him a percentage markup on the entire job.

SOF ¶191. The contract does not in any respect represent a general contractor construction contract and is limited to the specific tasks addressed. *SOF* ¶171.

The other people who were deposed who were working at the site confirmed that it was Peterson, not Knox, who was acting as project supervisor or general contractor. *SOF* ¶¶163, 184, 189, 190, 216, 217, 223, 226, 230, 238. Notably, both Knox and his employees understood that they were to look to Peterson and follow his directions with respect to construction related issues. *SOF* ¶¶184, 220-21, 223, 225-227,229-31, 234, 237-39, 241. For example, there was a problem with the clapboard siding. Peterson decided which clapboards would be used and which would be removed and returned to Shipley the supplier. *SOF* ¶221. According to Hicks, if there was a real big problem at the project, they would ask Peterson. *SOF* ¶229.

Also supporting a finding that Peterson rather than Knox was the general contractor and construction supervisor for the project is the fact that while Knox was on site very seldom (no more than about once per week), Peterson was on site almost every day. *SOF* ¶¶206-07, 209-10, 214, 216, 219. Peterson was on site at least three or four times a week if not more, and when there undertook the responsibilities of project supervisor. *SOF* ¶¶206-07, 209, 214, 216, 219.

With respect to safety issues in particular, the evidence establishes that Peterson, not Knox, was in control. According to Peterson, Knox was not responsible for the other trades and if there was a problem, including a safety issue, they would go to Peterson. *SOF* ¶181. The fact that Peterson was responsible for safety issues vis-a-vis other contractors strongly supports an inference that he was responsible for the safety of Knox's employees. Peterson oversaw the entire project, coordinated all of the trades, hired all of the contractors, supplied all of the materials and

undertook responsibility to see that project was done properly and safely. *SOF* ¶222. No one other than Peterson was responsible for safety issues.[12]

Even if Peterson and Knox had agreed that Knox would be responsible for safety, which is not the case here, Peterson could not rely on that agreement once it became apparent that (1) Knox was seldom on the worksite (and hence could not be supervising safety issues adequately) and (2) Knox's workers were in fact being subjected to unsafe working conditions.[13]

b. Peterson knew or reasonably should have known that Knox was having his workers perform their work in an unreasonably dangerous manner because both the unsafe condition of the scaffolding and the fact that the workers were not using required fall protection equipment were easily observable.

As set forth above, Peterson was at the worksite regularly (at least three to four times per week) for months prior to the accident. Therefore, he either knew or reasonably should have known of the dangerous work practices that were readily visible during those months.[14] In the present case, both the unsafe condition of the scaffolding and the fact that workers on the scaffolding were not using fall protection were readily observable.

The failure to use fall protection: Knox's employees testified that none of the workers ever used a safety harnesses or fall protection. *SOF* ¶257, 259, 270. Peterson agreed that he was at the site regularly and he observed the men working 16-20 feet high up on the staging without any fall

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[12] Fortier could not name or identify anyone who was responsible for safety at the site. *SOF* ¶246. He could not name or identify anyone who was responsible for inspecting the staging to make sure it was safe. *SOF* ¶247. Fortier acknowledged that the site was "unusual" in that there was no superintendent or foreman overseeing the work. *SOF* ¶249. He stated that there was no general contractor on the job. *SOF* ¶249. Nobody was overseeing safety which was "unusual". *SOF* ¶249. He agreed that there should have been someone there to make sure the work was being done properly and safely. *SOF* ¶250.

[13] Peterson appears to take the position that OSHA having cited Knox for violations is evidence that Peterson is not responsible for those dangerous conditions. However, OSHA's determination to cite the immediate employer for violations cannot be taken as a determination that some other party is not also responsible. See Rothstein, Mark A., Occupational Safety and Health Law, West Publishing (2012), at §7:2, p.298; Arizona Public Service Co. v. Industrial Comm. of Arizona, 178 Ariz. 341, 345, 873 P.2d 679, 683 (1994).

[14] Kostrzewa, 73 Mass. App. Ct. at 382.

protection. *SOF* ¶261. Ed Hicks and the other laborers agreed that they never used fall protection. *SOF* ¶259.

The Scaffolding: The scaffold was erected around the entire house and had been in place for about two months prior to Kelley and Hicks' accident. *SOF* ¶262. The components of the scaffolding were old, weathered and rotted. *SOF* ¶256, 277. The wooden pump jack poles in particular were old and weathered. Portions of the poles that were rotted had previously been cut off. The pump jack poles were 10-12 years old. Ed Hicks testified that the wood for the scaffolding was visibly weathered if not outright rotted. *SOF* ¶258. Exhibits 15 and 16 to Knox's deposition clearly show that the wood is old, weathered and deteriorated. *SOF* ¶264.

Michael Kelley also stated that the staging was visibly "bad", that it was discolored, weathered and old. *SOF* ¶260. Fortier agreed that the wood was visibly old and there were no mending plates at the joints. *SOF* ¶¶269, 275.

In addition, the scaffolding, as erected, was visibly unstable and dangerous. Harley Sentell stated that Peterson was present when he and Knox erected the scaffolding. *SOF* ¶280. He also testified that the very poles involved in plaintiffs' accident had previously been struck by a backhoe and then just pushed back into place. *SOF* ¶¶284-86. Harley Sentell observed that the scaffolding was bowed and that anytime anybody would get on it, it would bow away from the house. *SOF* ¶287. He testified that even after the scaffolding was erected, it was wobbly. "When you walked on it, it would shake all over the place." *SOF* ¶279. According to Harley Sentell, this was observable to the naked eye. "Yes. If anybody was on it, you could see it bowing out and wiggling all over the place". *SOF* ¶288.

c. *Peterson had the opportunity to prevent Knox from performing the work in an unreasonably dangerous manner.*

Peterson claims that he lacked the opportunity to exercise any retained control to protect Kelley and Hicks because he had no knowledge of the dangerous work or conditions at the site. For the reasons set forth in the preceding section, Peterson clearly knew or should have known of those dangers. Therefore, he had the opportunity to take action to protect Kelley and Hicks but negligently failed to do so.

2.3.3 Peterson's claim that injured employees of independent contractors cannot invoke the retained control exception lacks merit.

There is no legal basis for Peterson's claim that the retained control exception, embodied in Restatement §414 and Corsetti, does not apply where the owner or general contractor retained control over a subcontractor's work and the plaintiff is an employee of that subcontractor. See Peterson's Memorandum at p. 10. Peterson relies on the statement in §414 that "One who entrusts work to an independent contractor, but who *retains the control* of any part of the work, is subject to liability for physical harm to *others* for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." (Emphasis added by Peterson). He claims that "others" limits the application of §414 to persons other than the subcontractor's own employees. That is clearly wrong.

The word "others" clearly modifies the phrase "one who entrusts." Thus, the retained control exception can be used by any person other than the one who entrusts the work to an independent contractor (i.e. other than the owner). An employee of a subcontractor is within the class of persons who are protected by the exception. This interpretation is confirmed by an examination of the case law. Numerous Massachusetts case have applied the retained control

theory to cases in which the plaintiff is an injured employee of a subcontractor (or have assumed that the rule would apply if control had been adequately established).[15]

2.3.4 Peterson's reliance on the alleged open and obvious nature of the dangers which caused Kelley and Hicks' injuries is misplaced.

Nor is there any merit to Peterson's claim that Kelley and Hicks cannot recover because the dangers of working on scaffolding we open and obvious. See Peterson's Memorandum, p. 19. The problem with this argument is that Plaintiffs do not claim in this case that Peterson breached a duty to warn. That is a premises liability concept and Plaintiff's claims are not grounded in premises liability. Instead, Plaintiff's assert that Peterson retained control over the work he hired Knox to do, and therefore had a duty to exercise that control reasonably so as to protect persons (including Kelley and Hicks) who might be injured if Knox performed the work in an unreasonably dangerous way. The open and obvious rule is simply inapposite.

In a somewhat related argument, Peterson appears to claim that Kelley and Hicks assumed the risk of their injuries (see Peterson memorandum, p. 4) because they allegedly were aware of the dangers posed by the scaffolding and the failure to use fall protection. However, the defense of assumption of the risk was expressly abolished by the comparative negligence statute, G.L. c. 231, §85. This argument, therefore, at most raises a genuine issue of material fact and cannot entitle defendant to summary judgment.

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[15] See e.g. Dilaveris v. W.T. Rich Co., Inc., 424 Mass. 9, 11 (1996); Corsetti, 396 Mass. 1 (1985); Hathaway v. Massachusetts Port Authority, 78 Mass. App. Ct. 1106, 2010 WL 4366101 (11/4/10) (unpublished Rule 1:28 opinion); Kostrzewa v. Suffolk Construction Co., 73 Mass. App. Ct. 377, 379 (2008); Cheschi v. Boston Edison Co., 39 Mass. App. Ct. 133, 135-38 (1995); Callender v. CSH Realty Corp., 2007 WL 2705529, *1 (Mass. Super. 8/31/07); Cabreira v. Verizon New England, Inc., 2007 WL 1829382, *4 (Mass. Super. 6/14/07); Bouchard v. General Electric Co., 849 F.Supp. 103 (D. Mass. 1994); Farren v. General Motors Corporation, 708 F.Supp. 436 (D, Mass. 1989).

2.3.5 Peterson's claim that the scaffolding collapse was caused by Kelley and Hicks' failure to replace bracings which they had removed is both irrelevant to summary judgment and factually unsupported.

Peterson appears to argue that the scaffolding collapsed because Kelley and Hicks removed bracings to raise the scaffold but failed to replace those bracings after the operation was completed. This argument, even if true, is irrelevant. As Peterson states in his Memorandum, "proximate cause of the scaffolding collapse is not a material fact to this motion," because Peterson is relying on his lack of duty, not upon lack of causation.

In any event, Peterson's argument is unsupported by the evidence.[16] At a minimum, whether the bracing was removed, whether it was not timely replaced, whose responsibility it was to replace the bracing, and the extent to which the absence of bracing contributed to the scaffolding collapse are all issues of fact for the jury.

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[16] Peterson bases his claim that Kelley and Hicks removed and failed to replace the bracing entirely on the testimony of John Fortier. However that testimony is not credible. On direct examination, Fortier asserted that the vertical pump jacks supporting the horizontal platform on which Kelley and Hicks were working was attached to the house by means of horizontal 2x4 bracings, attached with nails or screws. *SOF* ¶305. However, on cross examination, Fortier was shown numerous photographs taken hours after the accident at different locations around the house, and admitted that there was no evidence that horizontal bracings had ever been used to attach any portion of the scaffolding to the house. *SOF* ¶309. In addition, when questioned by the police shortly after the accident, Fortier did not list removal of bracings as a cause of the accident. *SOF* ¶310. Further, while the OSHA report concerning the accident listed the failure to install bracings, it did not find that bracings had been installed and then removed. *SOF* ¶311. Fortier also failed to explain why, if Kelley and Hicks had failed to replace the horizontal bracing on the portion of the staging on which they were working only because they wanted to finish the Tyvek before lunch, there was no evidence of horizontal bracing on any of the other portions of the scaffolding (as to which Kelley and Hicks would not have had any incentive to not reattach the bracings). *SOF* ¶312. Finally, on cross-examination, Fortier completely abandoned his claim that horizontal bracings attached to the house had been removed and not replaced, instead asserting that Kelley and Hicks had removed and failed to replace cross bracings which attached the vertical pump jacks to each other. *SOF* ¶313. All of this evidence supports the conclusion that the horizontal bracings which Fortier claims Kelley and Hicks removed, in fact never existed. Nor is there any credible evidence that Kelley and Hicks removed any cross bracing. Moreover, both Hicks and Kelley categorically deny that they ever removed any cross bracing and failed to replace it. *SOF* ¶¶313a, 314.

2.4 Peterson negligently retained Knox as a contractor after Peterson knew or should have known that Peterson was violating applicable safety standards and endangering employees on the worksite.

Peterson is liable to Kelley and Hicks under a theory of negligent retention. As set forth in §2.3.2.b, supra, Peterson knew or reasonably should have known that Knox was exposing his workers to serious dangers by having them work on scaffolding which he knew or should have known was unsafe and by allowing them to work without fall protection in violation of 454 CMR 10.25(7)(b) (requiring workers on scaffolding, such as Kelley and Hicks, to use safety harnesses or other fall protection). However, Peterson negligently continued to employ Knox on the job, thereby exposing Kelley and Hicks to further dangers.

Restatement (second) of Torts, §411 provides:

> Negligence In Selection Of Contractor.
>
> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

In the present case, work on scaffolding clearly is "work which will involve a risk of physical harm unless it is skillfully and carefully done."

Massachusetts courts have adopted §411.[17] Although §411 speaks of negligent selection, a Massachusetts Court would also recognize a claim based on negligent retention of an independent

[17] Wright v. Kelliher, 2008 WL 4635860, *4 (Mass. Super. 9/10/08) (where plaintiff motorist sued business that hired contractor who hit plaintiff while intoxicated, court holds that a cause of action under Restatement §411 "is a viable tort in the Commonwealth," noting that the claim failed in McNamara only due to a lack of evidence); Day v. Davey, 2007 WL 6846659 (Mass. Super. 5/7/07) (denying owner's motion for summary judgment on §411 negligent selection claim brought by employee of selected contractor); Eisenberg v. Gouthro, 1995 WL 1146849, *1 (Mass. Super. 11/16/95) (holding that a genuine issue of material fact precluding summary judgment