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No. 66424-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

LARRY BRODERICK & TAMMY BRODERICK, husband and wife,

Appellants,

v.

THE PORT OF SEATTLE, a municipal corporation,

Respondent.

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COURT OF APPEALS
DIVISION I
SEATTLE, WA

BRIEF OF RESPONDENT PORT OF SEATTLE

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ORIGINAL

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I. **RESPONDENT'S STATEMENT OF THE CASE**

A. **Background Facts.**

1. **The Port Hires Northwest Asphalt—an Independent Contactor Solely Responsible for Control and Safety of its Work.**

The Port of Seattle contracted with Northwest Asphalt to apply asphalt on a section of a marine cargo pier in downtown Seattle commonly known as Terminal 25. CP 119, 123. Northwest Asphalt performed its work as an independent contractor that was solely responsible for overseeing the asphalt work. CP 128.

Pursuant to the terms of its contract with the Port, Northwest Asphalt exclusively controlled and directed the manner and means of its asphaltting operation:

The Contractor shall supervise and direct the Work using its best efforts, skills and attention. The Contractor shall be solely responsible for, and shall have control and charge of construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract[.]

CP 128. Northwest Asphalt retained full and exclusive responsibility for the safety of its employees, the conditions of the work site, and for the safe performance of its work:

The Contractor assumes full responsibility for and shall comply with all safety laws, regulations, ordinances and governmental orders with respect to the performance of the Contract.

...

The Contractor shall have the sole responsibility for the safety, efficiency and adequacy of the Contractor's plant, appliances and methods, and for any damage or injury resulting from their failure, or improper maintenance, use, or operation. The Contractor shall be solely and completely responsible for the conditions of the Project Site, including safety of all persons and property in performance of the Work.

CP 129-30; Appendix A at 21.

It is undisputed that the Port of Seattle did not direct or supervise Broderick's work. CP 59, 79. Broderick admitted in his deposition that he does not claim that the Port was in any way responsible for the supervision or control of the work of Northwest Asphalt. CP 59, 79; 80-81.

2. Plaintiff Larry Broderick.

Plaintiff Larry Broderick began working for Northwest Asphalt on August 25, 2008 as an equipment operator. CP 49. In his deposition, Broderick testified that he was knowledgeable of his responsibility to protect himself and observe safe work practices. CP 54; 72. Prior to being hired by Northwest Asphalt, Broderick had worked for a number of construction contractors and had specific experience with road construction, asphaltting work, and asphalt repair, including two years of work as a crew foreman for a contractor who performed such work. CP 35-37; 39-44. Broderick

not only understood how paving operations worked, he also understood that asphalt requires a proper underlayment to support it. CP 45.

Before coming to work for Northwest Asphalt, Broderick received extensive training on workplace safety around heavy equipment used in road construction and specific training on the use of fall protection. CP 46-47. Broderick understood that fall protection measures are necessary when working near a drop of more than four feet. CP 47-48. Broderick's formal safety instruction also included training on the inspection of job sites for safety. CP 48.

3. Terminal 25 Pier and Northwest Asphalt's Paving Project.

As its name indicates, Terminal 25 is a marine cargo terminal that is used for the loading, unloading, handling, and storage of marine cargo to and from ships. CP 119. Terminal 25 is a secured area, not accessible to the public, and is on Elliot Bay just north of the Spokane Street bridge. CP 120; 52. The terminal consists of a pier and its apron, which is the part of the pier used for vessel berthing and cargo handling. CP 120. At all material times, Terminal 25 was leased to a marine cargo company that used the

pier for the loading and unloading of ships and the handling and storage of marine cargo. CP 116-17; 119.

Steve Schmidt, a Port of Seattle construction inspector, met with Northwest Asphalt's job superintendent, Rex Allen, prior to the start of Northwest Asphalt's work. CP 120. Schmidt and Allen walked the terminal and identified the areas where Northwest Asphalt was expected to perform asphaltting work. CP 120. The Port's inspector specifically advised Northwest Asphalt that it did not need to apply asphalt closer than fifteen feet of the western edge (water side) of the pier. CP 120; 236.

Northwest Asphalt's job superintendent, Rex Allen, confirmed in his deposition that the Port did not request or expect any work to be done within 15-18 feet of the edge of the pier. CP 247-50. Allen explained that Northwest Asphalt would have been required to install guard rails at the edge of the pier if it were to work within 15 to 18 feet of the edge. CP 247-48. Because Northwest Asphalt was neither required nor intending to perform paving work within 15 feet of the edge of the pier, Allen placed orange safety cones 15 feet back from the edge to indicate the limits of the paving area. CP 249-50; 251.

4. Broderick's Knowledge of Open and Obvious Fall Hazard on Terminal 25 Pier.

Broderick began working at the Terminal 25 job site on August 27, 2008. CP 50. That day, Broderick operated equipment and assisted with the cleanup of asphalt removed around utilities fixtures at the site. CP 50-51.

Northwest Asphalt began its paving operations at the Terminal 25 site the following day. CP 55-56. Northwest Asphalt assigned Broderick to the paving crew as a laborer. CP 60. Broderick's laborer duties required him to follow behind the paver and rake asphalt dropped by it. CP 60-61.

Broderick admitted that he understood from the time he started his work at the jobsite that it was a pier. CP 53. Broderick also admitted that the abrupt edge of the pier, and potential fall hazard onto the rocks below, were obvious:

Q: Okay. But you could also see plainly that there was a drop along this edge here, couldn't you?

A: Yes. You could tell that it gradually went down.

Q: Sure. And there was nothing blocking it from your view? It was – it was obvious to you, wasn't it?

A: What was obvious?

Q: That there was a drop where the pier ended and there were rocks below. You could see that, couldn't you?

A: Yes.

CP 58.

5. Broderick Falls From Pier After Northwest Asphalt Workers Mistakenly Strayed From Paving Area and Performed Work Within 15 Feet of Edge of Pier.

The undisputed evidence established that Broderick walked backwards off the pier because Northwest Asphalt workers mistakenly paved near the edge of the pier—an area beyond the boundary of where the Port of Seattle had requested paving. CP 67; 120; 236; 249-50; 252. The Northwest Asphalt job superintendent (Rex Allen) was temporarily absent from the site when the paving crew strayed beyond the area that needed to be paved. CP 252. He admitted that his absence from the work site—and failure to direct his crew to stay more than 15 feet from the edge of the pier—was the cause of Broderick's fall. CP 252.

Prior to his fall, Broderick had been raking asphalt behind the asphalt paver for about two and a half hours during the morning of August 28, 2008. CP 60-61. The paver moved very slowly and Broderick admitted that he could easily walk faster than it operated. CP 64-65. During Northwest's paving work that morning, Northwest Asphalt's job superintendent temporarily left the

Terminal 25 work site. CP 252. While the Northwest Asphalt superintendent was away, the paver slowly moved into an area near the edge of the pier, dropped some asphalt, and started to re-orient itself to move in another direction. CP 60-63; 252. By that point, Broderick had positioned himself between the paver and the edge of the pier. CP 62-63. Broderick had his back to the edge of the pier, facing the paver, which was six to seven feet away. CP 64-66. The Northwest Asphalt paving crew supervisor was standing about ten feet away from Broderick observing the paving work. CP 77-78.

Broderick testified that the paver operator then directed him to step out of the way so that the paver could be moved. CP 62. Broderick admitted that he walked much faster than the paver moved and that he had plenty of time to move out of its way. CP 64-65. Rather than move out of the way, Broderick proceeded to take three steps backwards, without looking behind himself, and fell off the edge of the pier and onto the rocks and water below. CP 67, 70. Broderick admitted that had he simply turned around to see where he was walking, he would not have fallen. CP 82-83.

In his deposition, Northwest Asphalt's job superintendent (Rex Allen) explained that Broderick fell because the paving crew

mistakenly paved in the area near the edge of the pier during his absence. CP 252. Northwest's superintendent admitted that the cause of Broderick's fall was his failure to direct the paving crew to stay more than 15 feet from the edge of the pier. CP 252.

6. WISHA Inspection of Accident.

The Washington Department of Labor & Industries investigated Broderick's fall. The inspector evaluated the work of Northwest Asphalt and whether the Port of Seattle was in any way responsible. CP 88-96. The Department cited Northwest Asphalt for a serious safety violation for failing to install a guardrail or other barrier along the edge of the pier to prevent Broderick's fall. CP 91. The Department found no safety violations or responsibility for the fall on the part of the Port of Seattle. CP 94.

B. Procedural History

1. Broderick's Lawsuit and Claims.

In this lawsuit against the Port of Seattle, Broderick alleged two causes of action—a general negligence claim and a premises liability claim. CP 2-3. According to Broderick's complaint, he fell when a small piece of asphalt on the edge of the Terminal 25 pier gave way underneath him. CP 2. Tammy Broderick, Larry

Broderick's spouse, asserted a claim for loss of consortium as a result of her husband's injury. CP 4.

2. Broderick's Deposition Testimony.

Broderick testified that just before his fall, he was working near the edge of Terminal 25 with his back to it. CP 61-62; 65; 86. Broderick testified that he then took three steps backward and fell off the edge:

Q: But as far as Exhibit 3 is concerned, you had your back to this area that's a drop off?

A: Yes.

Q: And you backed over the edge? You walked backwards?

A: Yeah, I stepped backwards.

...

A: They – what I know is after about three steps back, I – I kind of blacked out I believe, because I started falling.

CP 66-67. Broderick admitted that had he simply turned around to see where he was walking, he would not have fallen. CP 82-83.

During his deposition, Broderick admitted that he has no personal knowledge of any asphalt giving way underneath him:

Q: . . . You just reported that – that someone else, a supervisor, told you that some asphalt or some paving gave way. I am asking you now, do you have any personal knowledge that anything gave way underneath you?

A: No, I can't say that I do.

CP 68; 228.

Broderick further admitted that the Port of Seattle did not direct or supervise his work. CP 59, 79. Broderick also admitted that he does not claim that the Port was in any way responsible for the supervision or control of the work of Northwest Asphalt. CP 59, 79; 80-81. Broderick testified that he believes the Port allowed an unsafe condition on its premises and should have placed guard rails at the edge of the pier. CP 75; 79-81.

3. The Port of Seattle Moves For Summary Judgment.

The Port of Seattle presented a motion for summary judgment based on the undisputed fact that Northwest Asphalt contractually retained sole and exclusive control over the manner of its work and job site safety, Broderick's admissions that the Port did not supervise or control Northwest Asphalt's work, and Broderick's admission that he walked backwards off the known and obvious edge of the pier. CP 11-28. The Port argued that it owed no duty of ordinary care to an employee of an independent contractor and that applicable state and federal safety regulations do not require railings along the edges of piers. Id.; CP 104-114.¹

¹ As set forth in the record, both state and federal safety regulations provide that guardrails are not required at docks, aprons, or waterside edges used for marine cargo handling. See CP 104-114 (WAC 296-56-60123(2)(b)(i), (ii) and 29 C.F.R. § 1917.112(2)(i), (ii)).

The Port also asserted that it was entitled to summary judgment on Broderick's premises liability claim because it had no duty to protect Broderick from Northwest Asphalt's breach of its independent duty to employ adequate safety measures in conjunction with its work and because there was no evidence that the Port should have anticipated Broderick's fall from the admittedly known and obvious condition posed by the edge of the terminal. Id.

4. Broderick Relies on Alleged Violations of WISHA Workplace Safety Regulations.

In response to the Port's motion for summary judgment, Broderick asserted that he fell because a piece of asphalt gave way underneath him. CP 131-41. Broderick relied on a number of WISHA workplace safety regulations and argued that the regulations imposed a duty on the Port of Seattle to repair or guard the edge of the pier. CP 134-37. Broderick did not address or dispute the fact that the Port neither retained nor exercised control over Northwest Asphalt's work or the safe performance thereof. CP 131-211.

Broderick did not dispute that the Northwest Asphalt workers had been paving in an area beyond the boundary of where the Port had requested paving work. CP 132-211. Broderick also did not

dispute that Northwest Asphalt's supervisor, Rex Allen, admitted that his temporary absence from the work site and his failure to direct his crew to stay at least 15 feet back from the edge of the pier was the cause of his fall. Id.

5. The Trial Court Grants the Port's Motion for Summary Judgment.

The trial court held a hearing on the Port's motion for summary judgment. During the hearing, Broderick's counsel admitted that the contract between the Port and Northwest Asphalt placed the duty of providing a safe work environment exclusively on Broderick's employer:

THE COURT: Let me stop you there and ask you this question. Is it not true, though, that the contract between Northwest Asphalt and the Port put the obligation on Northwest Asphalt to insure that the working environment was safe for their employees?

COUNSEL: Sure. It did . . .

Appendix A at 21². After hearing argument, the Court granted the Port's motion and summarized its reasoning as follows:

THE COURT: I am going to grant the motion for summary judgment. I think the Kamla case as well as the Kessler case are controlling in this regard. The Port did not retain

² Appendix A is relevant portions of the uncertified transcript of the December 3, 2010 hearing on the Port's motion for summary judgment. Because the court reporter who attended the hearing subsequently left employment with the King County Superior Court, the reporter was unable to produce and file an official transcript prior to the filing of Broderick's opening brief.

control over the manner or performance of the work, did not—there isn't a duty. And also there was no reason to expect that Northwest Asphalt would not protect against any obvious hazard, which was an obvious hazard that is there.

Appendix A at 34.

II. SUMMARY OF ARGUMENT

The trial court properly determined that the Port of Seattle is not liable for the injury sustained by Larry Broderick as a result of his fall from the Terminal 25 pier. Broderick's general negligence claim fails as a matter of law because Washington landowners do not owe an independent contractor (or its employees) a general negligence duty of "ordinary care".

The undisputed evidence also establishes that the Port of Seattle was entitled to summary judgment on Broderick's premises liability claim. The Port owed Broderick no duty to ensure compliance with the WISHA regulations he relies on as a matter of law. It is undisputed that the Port neither retained nor exercised control over the manner or means of Northwest Asphalt's work or the safe performance thereof.

In addition, the Port is not liable for Broderick's injury as a matter of law where it arose from the negligence or unsafe work of the Port's independent contractor. On summary judgment,

Broderick presented no evidence that the Port of Seattle should have anticipated that Northwest Asphalt would pave near the edge of the pier. It was undisputed that the Port did not request or require paving work to be performed within 15 feet of the edge of the pier, that Northwest Asphalt strayed beyond the area to be paved because of the absence of its superintendent, and that Northwest Asphalt alone had a duty to barricade the edge of the pier or use fall protection if it performed work near the edge of the pier. Summary judgment in favor of the Port should be affirmed.

III. ARGUMENT AND AUTHORITIES

A. Standard of Review.

The Court of Appeals reviews an order of summary judgment *de novo*, performing the same inquiry as the trial court. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, 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. CR 56(c).

To defeat summary judgment in a negligence case, the plaintiff must show an issue of material fact as to each element—

duty, breach of duty, causation, and damages. Kennedy v. Sea-Land Serv., Inc., 62 Wn. App. 839, 856, 816 P.2d 75 (1991). The threshold question of whether a duty of care exists is a question of law. Tincani v. Inland Empire Zoological Society, 124 Wn.2d 121, 128, 875 P.2d 621 (1994).

Affidavits in opposition to summary judgment must be based on personal knowledge, and must set forth admissible evidentiary facts. CR 56(e). When resisting a motion for summary judgment, the nonmoving party may not rely on speculation or argumentative assertions. Kirk v. Moe, 114 Wn.2d 550, 557, 789 P.2d 84 (1990). Summary judgment is appropriate if, from all the evidence, reasonable persons could reach but one conclusion. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. The Port Owed No Duty of "Ordinary Care" to Broderick As a Matter of Law.

As set forth above, Broderick asserted two causes of action against the Port, a general negligence claim and a premises liability

claim. CP 99-100. With respect to the general negligence claim, Broderick alleged that the Port of Seattle owed him a duty of “ordinary care” to maintain its premises in a reasonably safe condition. CP 99. The Port of Seattle owed Broderick no duty of ordinary care as a matter of law.

A cause of action for negligence requires the plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury. Tincani v. Inland Empire Zoological Society, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). The threshold determination of whether a duty exists is a question of law. Id.

It is well-established in Washington that the legal duty owed by a landowner to a person entering the premises depends on the status of the person who enters. Kamla v. Space Needle Corp., 147 Wn.2d 114, 125, 52 P.3d 472 (2002). Our Supreme Court has twice rejected the notion that a landowner owes a general negligence a duty of ordinary care to persons entering its premises; the landowner’s duty is determined by the status of the entrant as either a trespasser, licensee, or invitee:

First, we must determine whether in a claim for injury against an owner or occupier of land, the standard of care owed should continue to turn upon the common law distinctions

between invitee, licensee, and trespasser, or whether such distinctions should be replaced by a negligence standard of reasonable care under all the circumstances.

...
In Egede-Nissen, we acknowledged past questioning of the common law classification scheme, but decided that we were not ready then to totally abandon the traditional categories and adopt a unified standard. We still are not ready and reaffirm the common law classifications to determine the duty of care owed by an owner or occupier of land.

Younce v. Ferguson, 106 Wn.2d 658, 662-63, 724 P.2d 991 (1986) (citations omitted); see also Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 130-32, 606 P.2d 1214 (1980) (refusing to adopt general negligence standard of care in premises liability context).

Here, it is undisputed that Broderick was working on Port premises as the employee of an independent contractor responsible for laying asphalt. CP 119; 128; 59, 79. Employees of independent contractors hired by landowners are considered invitees on the landowner's premises. Kamla, 147 Wn.2d at 125. Because the Port of Seattle owed Broderick no duty of ordinary care as a matter of law, the trial court properly dismissed his negligence cause of action on summary judgment.

C. The Port Had No Duties Based on WISHA Regulations Where It Retained No Control Over Northwest Asphalt's Work.

In response to the Port's motion for summary judgment, and on appeal, Broderick relies on Washington Industrial Safety and Health ("WISHA") regulations contained in Chapter 296-56 of the Washington Administrative Code to argue that these regulations imposed a duty on the Port of Seattle to repair, guard, or barricade the edge of the pier where he fell. Broderick's reliance on WISHA regulations is misplaced. The Port retained no control over Northwest Asphalt's work or the safe performance of it and therefore had no duty to ensure compliance with WISHA regulations.

In Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002), our Supreme Court explained that "[e]mployers are not liable for injuries incurred by independent contractors because employers cannot control the manner in which the independent contractor works." Kamla, 137 Wn.2d at 119. The Court further explained that a landowner has no duty to comply with workplace safety regulations where it retains no control over the work of its independent contractor:

If a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW].

Kamla, 147 Wn.2d at 125 (internal quotation marks omitted; brackets in original). Applying this rule, the Court held that the landowner had no duty under WISHA regulations because it did not retain the right to control or interfere with the manner in which the independent contractor performed its work and did not affirmatively assume responsibility for worker safety. Kamla, 147 Wn.2d at 121-22.

The same holds true here. As the trial court correctly observed, it is undisputed that the Port of Seattle did not retain control over the manner in which Northwest Asphalt performed its work and did not assume any responsibility for the safe performance of Northwest Asphalt's work:

- The contract between the Port and Northwest Asphalt assigned to Northwest Asphalt sole and exclusive control over the manner in which it would complete its work. CP 128.
- Northwest Asphalt contractually retained full and exclusive responsibility for the safety of its employees, the conditions of the work site, and for the safe performance of its work. CP 129-30; Appendix A at 21.

- The Port of Seattle did not direct or supervise Broderick's work or the work of Northwest Asphalt. CP 59, 79 (Broderick deposition); CP 119 (Declaration of Steve Schmidt).
- Broderick admitted in his deposition that he does not claim that the Port was in any way responsible for the supervision or control of the work of Northwest Asphalt. CP 59, 79; 80-81.

Broderick argues without support that the Port of Seattle had a duty to protect him by ensuring that an independent contractor complied with workplace safety regulations contained in Chapter 296-56 WAC. That Chapter consists solely of WISHA workplace safety regulations promulgated by the Department of Labor & Industries. See RCW 49.17.010; 49.17.020. Under Kamla, the Port of Seattle had no duty to ensure compliance with WISHA regulations because it is undisputed that the Port retained no control over the manner in which Northwest Asphalt performed its work. Kamla, 147 Wn.2d at 125. For these reasons, the trial court properly dismissed Broderick's action, whether styled as a general negligence claim or a premises liability claim.

D. Broderick's Premises Liability Claim Fails As a Matter of Law.

Under Washington law, employees of independent contractors hired by landowners are considered invitees on the landowner's premises. Kamla, 147 Wn.2d at 125.

Washington has adopted sections 343 and 343A of the Restatement Second of Torts to define a landowner's duty to invitees. Id. Under the applicable standard, a possessor of land is subject to liability for physical harm caused to invitees by a condition on the land only if the possessor

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that [invitees] will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care protect [invitees] against the danger.

Kamla, 147 Wn.2d at 125-26, quoting Restatement Second of Torts § 343.

The trial court properly dismissed Broderick's claims on summary judgment because under Washington law the Port is not liable for injuries that arise from the negligence or unsafe work of an independent contractor and had no duty to protect Broderick from the known and obvious edge of the pier. While a landowner has a duty to keep premises reasonably safe,

[t]he law requiring an owner to keep the place reasonably safe for a contractor and his subcontractors does not apply where the work itself is of an unsafe nature or the defects

are due to the imperfect and negligent work of the contractor himself.

Epperly v. City of Seattle, 65 Wn.2d 777, 786, 399 P.2d 951 (1965).

A landowner is also generally not liable to an invitee for harm caused by an activity or condition whose danger is known or obvious to the invitee:

A possessor of land is not liable to . . . invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Kamla, 147 Wn.2d at 126 (discussing Restatement Second of Torts § 343A).

The application of these rules entitled the Port to summary judgment regardless of whether Broderick walked backwards off the edge of the pier or whether a piece of asphalt gave way underneath his feet. In either case, no evidence exists that the Port of Seattle should have anticipated that Northwest Asphalt would pave near the edge of the pier or that Northwest Asphalt would perform its work in a dangerous and unnecessary manner.³

³ As the Port argued below, Broderick presented only inadmissible hearsay in support of his claim that he fell due to a piece of asphalt "giving way." See CP 215-16; Dunlap v. Wayne, 105 Wn.2d 529, 535-36, 716 P.2d 842 (1986) (A court cannot consider inadmissible evidence when ruling on a motion for summary judgment). Broderick's only response to the Port's evidentiary objections below was a claim that the Port's Post Incident Evaluation qualified as

In Epperly, an employee of an independent contractor working on a project for the City of Seattle was killed when he was struck by a falling cable. The widow of the deceased worker asserted a premises liability claim based on an alleged failure to furnish a safe workplace. Epperly, 65 Wn.2d at 785. The trial court granted summary judgment in favor of the City and the Supreme Court affirmed. The Court explained that “the general rule is that the owner of premises owes to the servant of an independent contractor employed to perform work on his premises the duty to avoid endangering him by his own negligence or affirmative act, but owes no duty to protect him from the negligence of his own master.” Id.

The Epperly Court rejected the notion that an injured party’s status as an invitee gives rise to a duty on the part of the landowner

an admission of a party opponent under ER 801(d)(2). See Appendix A at 19. This is incorrect. The Port employee who prepared the Evaluation form testified that the description of Broderick’s fall contained within it was not based on his work, but on hearsay information obtained from others. CP 216; 260. Broderick did not claim or establish the applicability of any exception to the additional levels of hearsay. Broderick also did not make the required foundational showings that the preparing employee had authority to make the statement in question or that the Port manifested an adoption or belief in the truth of the hearsay information included in the Evaluation. See 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice §§ 801.40, 801.47, at 397, 414 (5th ed. 2007); Appendix A at 19. Notwithstanding the evidentiary issue, the Port was entitled to summary judgment whether Broderick walked off the edge of the pier or whether a piece of the edge gave way. The WISHA regulations he relies on do not give rise to a duty because the Port did not retain control over Northwest Asphalt’s work and the Port is not liable for injuries arising from the unsafe or negligent performance of the work of its independent contractor.

to protect him from the negligent acts of his employer. Epperly, 65 Wn.2d at 786. The Court held that the City of Seattle discharged its duty because it did not supervise the contractor's activities, did nothing to affirmatively increase the risk, turned over the premises in a safe condition, and knowledge of the hazard was equally available to the contractor as it was to the City. Id. at 787.

This court applied a similar analysis in Kessler v. Swedish Hospital Medical Center, 58 Wn. App. 674, 794 P.2d 871 (1990). Kessler affirmed summary judgment in favor of the landowner and held that the landowner owed no duty to an injured worker of an independent contractor who fell from a ladder while cleaning windows. The court applied the rule that an owner is not liable for harm caused by activities or conditions that are known or obvious to them unless the owner should anticipate the harm despite the worker's knowledge or the obviousness of the hazard. Kessler, 58 Wn. App. at 678. Specifically, the court emphasized that the plaintiff presented no evidence that the landowner should have anticipated the harm sustained where the use of the ladder was performed in a dangerous and unnecessary manner. Kessler, 58 Wn. App. at 678. Accordingly, the court held that the hospital owed no duty to the plaintiff under section 343 of the Restatement. Id.

The same analysis applies here. Broderick presented no evidence that the Port of Seattle should have anticipated that Northwest Asphalt would pave near the edge of the pier. Broderick did not and could not dispute that his fall resulted from Northwest Asphalt's work performed in a dangerous and unnecessary manner. It is undisputed that the Port did not request or expect Northwest Asphalt to perform any work within 15 feet of the edge of the pier. CP 120; 236; 249-50. Northwest Asphalt's job superintendent confirmed that he was not asked to, and did not intend to, perform paving within 15 feet of the edge of the pier. CP 249-50.

It is also undisputed that Northwest Asphalt equally knew of the danger posed by the edge of the pier. Northwest Asphalt's job superintendent understood that if his crew were to work within 15 to 18 feet of the edge of the pier, Northwest Asphalt would have been required to erect a safety barricade or take other safety precautions. CP 247-48. Because Northwest Asphalt understood that no paving was required near the edge of the pier, Northwest Asphalt's job superintendent placed orange safety cones 15 feet back from the edge to indicate the limits of the area where work was to be performed. CP 251.

The Port of Seattle hired Northwest Asphalt, an experienced asphaltting contractor, to perform the paving work. CP 117; 118-19. It is undisputed that the Port retained no control over the methods or means that Northwest Asphalt would employ to complete its contract work, or the safety measures it followed. CP 79-81; 128-30; Appendix A at 21. It is also undisputed that the Port did not direct or supervise that work. CP 59; 79.

It is also undisputed that Northwest Asphalt alone had the duty to comply with safety regulations for the protection of its workers. This included barricading the edge of the pier if it needed to pave that part of the premises. On summary judgment, it was undisputed that the Port of Seattle had no duty to barricade the edge of the pier. The law expressly does not require railings along the edges of piers because they interfere with cargo handling activities. CP 104-114 (WAC 296-56-60123(2)(b), 29 CFR § 1917.112(2)); CP 116-17.

Under its contract, Northwest Asphalt was solely responsible for supervising the paving work and the safe performance of its work. CP 128-30; Appendix A at 21; CP 59, 79. Northwest Asphalt assumed full control over the work site, exclusive responsibility for the safety of its crew, and the safe performance of its work.

Northwest Asphalt alone had the duty to ensure compliance with workplace safety rules and regulations. Kelly v. Howard S. Wright Const. Co., 90 Wn.2d 323, 334-336, 582 P.2d 500 (1978) (duty to comply with workplace safety regulations rests with party having control over work area or who contractually or otherwise assumes responsibility for safety precautions). Under both the terms of the contract and applicable law, Northwest Asphalt had the obligation to barricade the edge of the pier if it performed work in that area. CP 91; 94; 128-30; Appendix A at 21. The WISHA accident inspector correctly reached the same conclusion. CP 91; 94 (citing WAC 296-155-505(6)(a); WAC 296-56-60123(2)).

Under Epperly and Kessler, the Port owed Broderick no duty and is not liable for Broderick's fall as a matter of law. No reasonable fact finder could conclude that the Port failed to exercise reasonable care to protect its independent contractor from conditions in an area where the contractor was not expected to be working. Further, no reasonable fact finder could conclude that the Port had a duty to protect Broderick from the negligent or unsafe performance of Northwest Asphalt's work. Summary judgment in favor of the Port of Seattle should be affirmed.

This court should also affirm on the secondary basis applied in Kessler. In that case, a panel of this court explained that the rule announced in Tauscher v. Puget Sound Power and Light Co., 96 Wn.2d 274, 635 P.2d 426 (1981) also entitled the landowner to summary judgment under similar circumstances. As the Kessler court explained, Tauscher involved the death of a worker of an independent contractor who was killed when working within two feet of high voltage lines without protective barriers in place and without adequate supervision. There, the Supreme Court applied the general rule that a landowner who employs an independent contractor is not liable for injuries to employees of the independent contractor resulting from the contractor's work. Kessler, 58 Wn. App. at 679, citing Tauscher, 96 Wn.2d at 279.

In Kessler, this court held that the Tauscher analysis equally limits a landowner's liability for claims of an injured independent contractor based on section 343 A of the Restatement:

The [Tauscher] court noted that a party who employs an independent contractor is not liable for injuries to employees of the independent contractor resulting from such contractor's work, and held that "the employer's liability does not extend to employees of independent contractors merely because of the presence of inherently dangerous activities."

The Tauscher court did not discuss the applicability of § 343A to an invitee who is the employee of an independent

contractor, nor does the Restatement address a landowner's duty to an employee of an independent contractor in this context. In our opinion, however, Tauscher limits the liability confronting landowners under § 343A in such cases and is controlling here. As cogently stated in Tauscher, it would be an undesirable rule that would insulate a landowner from his own employees' claims under workers' compensation laws, yet make him liable to an independent contractor's employee, who is hired specifically to perform the hazardous work in question. Summary judgment was properly granted.

Kessler, 58 Wn. App. at 678-79 (emphasis added and footnotes omitted).

The same analysis applies here. In this case, it is undisputed that Broderick fell because Northwest Asphalt strayed from the area to be paved and performed work in an area in which it was not expected or asked to pave. CP 120; 236; 249-50; CP 61-62; 66-67; 86. It is also undisputed that Broderick and Northwest Asphalt strayed from the area requiring paving and proceeded to work near the edge of the pier without erecting a protective barrier or utilizing fall protection as required by construction safety regulations. CP 61-62; 66-67; 86; CP 91; 94 (WISHA inspection, citing WAC 296-155-505(6)(a); WAC 296-56-60123(2)). It is also undisputed that this unsafe work took place while Northwest Asphalt's job superintendent was away from the worksite and not supervising his crew. CP 252. Northwest Asphalt's job

superintendent admitted that it was his fault that Broderick fell because he was not at the site to ensure that his crew stayed at least 15 feet away from the edge of the pier—an area where it was not required or expected to perform work. Id.

Just as in Kessler and Tauscher, it would be an undesirable rule that would insulate the Port of Seattle from a claim of its own employee under workers' compensation laws, yet render it liable for injury to its independent contractor's employee—a contractor hired to perform construction work on Port premises in compliance with applicable safety regulations but who failed to follow them. This is particularly applicable where it is undisputed that the Port did not retain or exercise control over the manner or means of Northwest Asphalt's work or its safety practices.

Under Kessler and Tauscher, the Port of Seattle is not liable for injuries sustained by employees of its independent contractor that result from the contractor's negligent work. The Port of Seattle's "liability does not extend to employees of [its] independent contractors merely because of the presence of inherently dangerous activities." See Kessler, 58 Wn. App. at 678. Northwest Asphalt unexpectedly strayed from the area requiring paving, moved into the area near the edge of the pier, and failed to observe

safety precautions to guard against falls. The Port of Seattle is entitled to summary judgment as a matter of law and the trial court's order of dismissal should be affirmed.

E. Tammy Broderick's Loss of Consortium Claim Was Properly Dismissed As a Matter of Law.

Tammy Broderick's cause of action consists solely of a loss of consortium claim allegedly resulting from the injuries sustained by her husband in his fall from the pier. CP 4. The nature of this cause of action is "for damages for the loss of her husband's consortium due to the negligence of a third party." Lundgren v. Whitney's, Inc., 94 Wn.2d 91, 96, 614 P.2d 1272 (1980). Because the Port of Seattle is not liable for Larry Broderick's unfortunate fall as a matter of law, Tammy Broderick's loss of consortium claim arising from the same injury was properly dismissed on summary judgment. This court should affirm the dismissal of Tammy Broderick's claim.

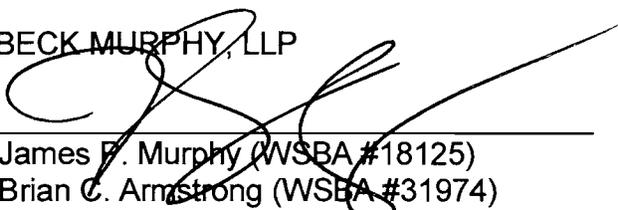
IV. CONCLUSION

The undisputed evidence establishes that the Port of Seattle owed Broderick no duty and is not liable for his unfortunate fall as a matter of law. Broderick cannot establish a duty based WISHA regulations where the Port retained no control over Northwest

Asphalt's work. No reasonable fact finder could conclude that the Port failed to exercise reasonable care to protect its independent contractor from conditions in an area where the contractor was not expected to be working, or that the Port had a duty to protect Broderick from the negligent or unsafe performance of Northwest Asphalt's work. Summary judgment in favor of the Port of Seattle should be affirmed.

Respectfully submitted this 30th day of March, 2011.

LYBECK MURPHY, LLP

By: 

James F. Murphy (WSBA #18125)

Brian C. Armstrong (WSBA #31974)

Attorneys for Respondent Port of Seattle

TABLE OF APPENDICES

Appendix A: Portions of the Uncertified Transcript of the December 3, 2010 Hearing on the Port of Seattle's Motion for Summary Judgment.

APPENDIX A

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STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING
BEFORE THE HONORABLE JOAN E. DuBUQUE, JUDGE

BRODERICK,)
)
Plaintiff,) No. 09-2-24287-9 SEA
)
vs.)
)
PORT OF SEATTLE,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DECEMBER 3, 2010

APPEARANCES:

For the Plaintiffs: WILLIAM COATS
For the Defendant: JAMES MURPHY
BRIAN ARMSTRONG

Court Reporter Laurene Kelly, RDR, CRR, CCR #2835
516 Third Avenue #C-809, Seattle, WA 98104
206.296.9157 laurene.kelly@kingcounty.gov

1 SEATTLE, WASHINGTON

FRIDAY, DECEMBER 3, 2010

2 HON. JOAN E. DuBUQUE, JUDGE

9:00 A.M.

3

PROCEEDINGS:

4

THE COURT: Why don't I go ahead and recite for
5 the record what I've received for purposes of the
6 Port of Seattle's motion for summary judgment?

7

I've received the defendant's motion for summary
8 judgment supported by the declaration of James
9 Murphy and exhibits A through F, the declaration of
10 Tom Burke, the declaration of Steve Schmidt and
11 exhibit A.

12

I've received the plaintiff's response to the
13 summary judgment motion supported by the declaration
14 of Bill Coats and exhibits A through O.

15

I've also received the defendant's reply
16 memorandum supported by the supplemental declaration
17 of Mr. Murphy and exhibits A through G.

18

I believe that should be everything. Correct?

19

MR. COATS: Yes, Your Honor.

20

THE COURT: All right. I'm ready to proceed
21 whenever you are, counsel.

22

MR. MURPHY: Thank you, Your Honor.

23

I am James Murphy and it's a pleasure to be in
24 your courtroom today. I represent the Port of
25 Seattle in this motion for summary judgment.

1 in dispute.

2 Your Honor, the -- I would submit that the --
3 that is the Port's own incident evaluation. They
4 admit in their own incident evaluation that
5 Mr. Broderick stepped on the cement and a piece
6 approximately 12 inches, 12 by 12, fell out from
7 underneath him.

8 It's not hearsay. Under Rule 801 D 2 admissions
9 by a party opponent are not hearsay. And the
10 statement is offered against the party and is a
11 statement of which the party has manifested an
12 adoption or belief in its truth.

13 Obviously this is the Port's very own
14 investigative report. It's their version of what
15 happened. They have manifested an adoption or
16 belief in its truth.

17 So we would submit that's sufficient evidence to
18 at least present to the jury that the reason for
19 Mr. Broderick's fall was not simply because he
20 walked off the edge of a pier. It's because he
21 stepped on a piece of eroded concrete that gave way
22 beneath him.

23 And that's what makes this case different from
24 the Kessler case. In Kessler there's nothing
25 inherently unsafe about windows that don't open from

1 close.

2 And if you look to the third page of the exhibit
3 you'll see the photos there, and you'll notice
4 that's a pretty darn steep fall-off. The Port
5 admits that they know that the contractors are going
6 to be working this close to that edge.

7 Now, knowing that the -- knowing that the
8 contractors are going to be that close to the edge,
9 should they have done something? Well, that's at
10 least a jury question, Your Honor, at least a jury
11 question. That's a pretty darn close proximity to
12 an edge that steep.

13 THE COURT: Let me stop you there and ask you
14 this question. Is it not true, though, that the
15 contract between Northwest Asphalt and the Port put
16 the obligation on Northwest Asphalt to insure that
17 the working environment was safe for their
18 employees?

19 MR. COATS: Sure. It did. And in fact the Port
20 is free at trial to argue to the jury that the --
21 that Mr. Broderick may have been contributory
22 negligence and the Northwest Asphalt may have been
23 contributory negligence, but the Port can't -- the
24 duty about the concrete had nothing to do with a
25 safe working environment. The Port did not put the

1 your workers.

2 And that directly applies here. Mr. Broderick is
3 now claiming that there's some other WACs that
4 relate to working surfaces, and I'm glad Mr. Coats
5 accurately quoted those sections. Each one that he
6 quoted contains a language, working surfaces. Those
7 are areas where you're expecting people to work. So
8 even if you're to somehow ignore Kamla and allow a
9 negligence claim against the Port of Seattle you
10 still can't get around the idea that this was not a
11 working surface. He wasn't expected to be working
12 in that area.

13 Mr. Coats acknowledged, as it's admitted here,
14 this was an obvious condition. Everybody knew they
15 needed to stay back from that area. Mr. Allen
16 admitted it was his fault for not having kept those
17 workers to at least a minimum of 15 feet back. It
18 was his intent to keep them 15 to 18 feet back,
19 according to Mr. Allen.

20 And Mr. Broderick can't get around the cases,
21 because the cases actually set forth the rules.

22 The Port is entitled to summary judgment,
23 dismissal of this case with prejudice, Your Honor.
24 And thank you for your time.

25 THE COURT: I am going to grant the motion for

1 summary judgment. I think the Kamla case as well as
2 the Kessler case are controlling in this regard.
3 The Port did not retain control over the manner or
4 performance of the work, did not -- there isn't a
5 duty. And also there was no reason to expect that
6 Northwest would not protect against any obvious
7 hazard, which was an obvious hazard that is there.

8 So I'm granting your motion for summary judgment.

9 MR. MURPHY: Thank you, Your Honor.

10 THE COURT: Does that recite all the
11 pleadings --

12 MR. MURPHY: Yes. I actually prepared one
13 yesterday that lists off all of the declarations.
14 And I believe at the outset, Your Honor, when you
15 listed off the various declarations there was one
16 declaration that you didn't mention and that was the
17 declaration of Christy Trudell --

18 THE COURT: But that was just -- I'm attempting
19 to locate --

20 MR. COATS: It actually was included as an
21 exhibit to my declaration.

22 THE COURT: Right. It wasn't independent of your
23 exhibits.

24 MR. MURPHY: In any event this is the revised
25 version. This is the revised version, Mr. Coats.

1 THE COURT: Would you like a copy?

2 MR. MURPHY: Yes, Your Honor.

3 THE COURT: You only have a place for your
4 signature. If you just want to put copy received so
5 plaintiff's counsel can sign off.

6 All right. Thank you.

7 MR. MURPHY: Thank you, Your Honor.

8 --000--

9 (Proceedings were concluded at
10 9:48 a.m.)

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1 STATE OF WASHINGTON)
)
2 COUNTY OF KING)

3

4 I, LAURENE KELLY, HEREBY CERTIFY:

5 That the foregoing pages 1 through 35,
6 inclusive, are a full, true, and correct transcript of
7 the testimony given and proceedings had in the
8 above-mentioned action taken on DECEMBER 3, 2010;

9 That it is a full, true, and correct transcript of
10 the evidence offered and received, acts and statements of
11 the Court, also all objections of counsel and all matters
12 To which the same relate;

13 That I reported the same in Stenotype to the best of
14 my ability, being the duly appointed, qualified, and
15 acting official stenographic reporter of said court, and
16 thereafter transcribed the same into typewriting as
17 herein appears.

18 Dated this 1st day of MARCH, 2011.

19

20

21

LAURENE KELLY, RDR, CRR, CCR #2835

22

23

24

25

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2011, the undersigned caused copies of the documents identified below to be filed and served as indicated:

- Brief of Respondent Port of Seattle with Certificate of Service

SERVED ON:

Office of Clerk	<input type="checkbox"/> Mail
Court of Appeals – Division I	<input type="checkbox"/> Facsimile
One Union Square	<input checked="" type="checkbox"/> Messenger
600 University Street	
Seattle, WA 98101	

Mr. Bill Coats	<input type="checkbox"/> Mail
Attorney for Appellants/Plaintiffs	<input type="checkbox"/> Facsimile
Brett & Coats	<input type="checkbox"/> Messenger
1310 10 th Street Suite 104	<input checked="" type="checkbox"/> Email
Bellingham, WA 98227	

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of March 2011.


Darcie Kaplan, Legal Assistant