

NO. 34552-8-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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Susan Sanders, a married woman, Appellant,

v.

Joel Anderson and Carol Anderson, husband and wife, and the  
marital community comprised thereof, Respondents.

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REPLY BRIEF OF APPELLANT

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Appellant

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ORIGINAL

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**A. Restatement of Issues**

1. **Whether Plaintiff's Motion for Summary Judgment Should Have Been Granted.**
2. **Whether Defendant's Motion for Summary Judgment Should Have Been Denied.**
3. **Whether Plaintiff's Motion for Reconsideration Should Have Been Granted.**

**B. Abbreviated Statement of the Case**

I. DISPUTED FACTUAL HISTORY

**a. Background Information**

Prior to her fall, Ms. Sanders used this guest bathroom at least twice a day during her visit. CP 20: Ex 1, 47:14-16 (CP 26) and 54:8-21 (CP 27).

Ms. Sanders generally doesn't wear shoes in houses. CP 20: Ex 1, 68:18-23 (CP 30). CP 20: Ex 1, 68:14-18 (CP 30) and 73:14-75:9 (CP 31). She also walked around the Anderson house in her stocking feet. CP 20: Ex 1, 62:25-63:12 (CP 29).

Ms. Anderson believes that people would feel comfortable walking around her home without shoes on. CP 20: Ex 2, 16:18-21 (CP 43).

Prior to the slip and fall on August 29, 2001, Ms. Sanders had no problem walking anywhere in the house. CP 20: Ex 1, 71:15-17 (CP 31). She had even entered the guest bathroom at least three other times in her stocking feet. CP 20: Ex 1, 62:25-63:12 (CP 29). Ms. Sanders saw no visible difference between the tiles under the throw rug and those not under the throw rug. CP 20: Ex 1, 72:21-73:13 (CP 31).

**b. Notice of the Unreasonably Slippery Condition**

A considerable period of time before 2001, and probably within a year of moving in, Joel Anderson slipped on the tile floor where a rug had been removed. CP 20: Ex 2, 23:20-24:3 (CP 49-50). Mr. Anderson caught himself on the walls halting his fall to the floor CP 173: Ex 5, 6:22-7:5 (CP 226). Ms.

Anderson had taken up the throw rug to wash it. CP 20: Ex 2, 21:23-25 (CP 46); Ex 3, 6:12-7:14 (CP 71-72).

From the time Mr. Anderson slipped, Ms. Anderson realized “that the rugs might have created a slippage, so I made sure – that became a practice. When I washed those hall rugs and the one in front of the front door, I did it when nobody was home, and I would count the tile to lay the rugs right back down where they were. CP 20: Ex 2, 21:25-22:5 (CP 47-48). It was then that they realized “that where the carpets were, it was more slippery than around the carpets . . .” CP 20: Ex 2, 24:13-17 (CP 50). Mr. Anderson described the floor tiles under the rug as “considerably more slippery than . . . the area of the tile that the rug wasn’t in.” CP 20: Ex 3, 8:12-19 (CP 72-73). Both Mr. and Mrs. Anderson were aware, based on their prior experience, that the area under the rug was slippery. CP 20: Ex 3, 10:21-11:1 (CP 74-75). To prevent further slips, Ms. Anderson knew that she needed to be sure that nobody could walk on the floor when she swept under a throw rug. CP 20: Ex 2, 25:4-8 (CP 51) and

38: 4-12 (CP 60). For that reason, Ms. Anderson made a practice of removing rugs only when no one was home. CP 20: Ex 2, 22:2-5 (CP 48). She was also very careful to put the rugs back in the exact location they were prior to being picked up. CP 20: Ex 2, 22:4-5 (CP 48).

The Andersons did not warn their guests to avoid those areas if the rugs had been taken up. CP 20: Ex 2, 38:1-3 (CP 60); Ex 3, 11:2-3 (CP 75). Mrs. Anderson did not block off the area, but she realizes that if she had blocked the walkway, the slip and fall would have been prevented. CP 20: Ex 2, 39:21-25 (CP 61).

Ms. Sanders had not been warned of the slippery condition that existed under the area rugs; Ms. Sanders had not slipped on the tile floors during her stay at the Anderson house; there was nothing to indicate to Ms. Sanders that the subject area was slippery – they looked like perfectly normal tiles CP 20: Ex 1, 73:14-74:22; 77:4-7 (CP 31-32) and CP 20: Ex 3, 11:4-7 (CP 75).

**c. Evidence of the Unreasonably Slippery Condition**

About twenty years ago, Mr. Anderson slipped, but caught himself, on the tile floor. CP 20; Ex 2, 23:20-24:11 (CP 49-50); Ex 3, 6:12-7:5 (CP 71-72). He slipped on tiles that had been covered with an area rug until just prior. CP 20; Ex 3, 7:6-14 (CP 72). Mrs. Anderson takes up the rugs when no one else is home: she is meticulous about ensuring that they are returned to their exact prior location, even going so far as to count the tiles to guarantee proper placement. CP 20; Ex 2, 22:2-5 (CP 48).

In the days after the fall, Mrs. Anderson tested the tiles where Ms. Sanders slipped and found that there was a difference: slick under the rug and not slick outside the area of the rug. CP 20; Ex 2, 34:20 - 36:13 (CP 58). Mr. Anderson also tested the tiles where Ms. Sanders slipped. CP 95; Ex 5, 12:3-5 (CP 152). He felt the subject area with his hand and found that it had a “smoothness that is characteristic of the effect of that – that rubberized back on – you know, on that tile.” CP 95; Ex 5,

12:3-20 (CP 152). Mr. Anderson characterized “smoothness” as “a much reduced element of friction to the touch, as to opposes to something that the rubberized backing has not been in contact with on the tile.” CP 95; Ex 5, 12:21 – 13:2 (CP 152). The subject tiles were clearly different from the surrounding tiles outside of the area where the throw rug is. CP 95; Ex 5, 13:3-8 (CP 152). In his opinion the tiles were slippery. CP 20; Ex 3, 13:15-21 (CP 76).

Both Mr. and Mrs. Anderson state that they knew the tiles under the area rugs were slippery. CP 20; Ex 2, 24:15-17 (CP 50); Ex 3, 10:21-11:1 (CP 74-75). They also state that the tiles that were not under the tile rugs were not slippery. CP 20; Ex 2, 24:18-24 (CP 50) and 38:4-12 (CP 60); Ex 3, 8:12-19 (CP 73) and 17:22-25 (CP 80).

Mr. Anderson believes that Ms. Sanders was using reasonable care at the time she slipped and fell and sees no reason she should be held responsible for the fall. CP 20: Ex 3, 13:25-14:12 (CP 76-77).

In October 2005, Defendant's expert, Mr. Topinka, tested the tile floor in the area where Ms. Sanders slipped. CP 230-231. Mr. Topinka's opinion is that the floor was properly slip resistant. CP 231. Mr. Topinka did not address the coefficient of friction necessary to be sufficiently slip resistant for people who are wearing stockings, as opposed to shoes. CP 230-231.

Contrary to Respondents statement, Mr. Topinka's opinion is contested: based on their years of experience with the tile floor in question and their personal examination of the subject tiles, the Anderson's have provided evidence that the subject tiles were in fact not sufficiently slip resistant under the circumstances.

**C. Rebuttal Argument**

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
SHOULD HAVE BEEN GRANTED.

For Summary Judgment on liability, Plaintiff was required to show that there was not an issue of material

fact. A material fact is one upon which the outcome of the litigation depends in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974). At the time of Plaintiff's motion, the evidence concerning the slipperiness of the subject floor was the testimony of the Defendant's. Their testimony showed that the floor was unreasonably slippery, and they knew it. Defendants did not present any evidence to the contrary. Because the evidence in the light most favorable to Defendants supported Plaintiff's assertion that the subject floor was unreasonably dangerous, Plaintiff's Motion for Summary Judgment should have been granted.

Contrary to respondent's assertion, there is no indication in the Court's Order denying the motion on the grounds that there was a question concerning comparative fault or the need for expert testimony to establish that there was an unreasonable risk of harm. Mr. Anderson has testified that he believes Ms. Sanders was using reasonable care at the time of the incident.

II. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
SHOULD HAVE BEEN DENIED.

For Summary Judgment on liability, Defendant was required to show that there was not an issue of material fact. A material fact is one upon which the outcome of the litigation depends in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974). At the time of Defendant's motion, evidence concerning the slipperiness of the subject floor through Mr. Topinka and Mr. and Mrs. Anderson.

Mr. Topinka, an expert mechanical engineer, found the floor met the standard for sufficient slip resistance for use with shoes four years after the incident. Mr. and Mrs. Anderson, arguably experts based on experience with the subject tiles, tested the subject area and found the subject tiles to be much smoother, slipperier, and slicker than the surrounding tiles. Opinions concerning the tiles provided by the Andersons were

based on their own perceptions of the subject tiles as well as the surrounding tiles.

With evidence to support both sides of the issue, summary judgment was improperly granted.

**D. Conclusion**

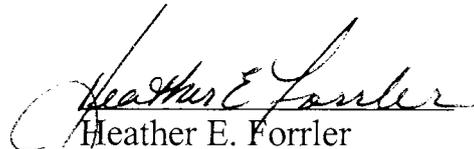
At the time of Plaintiff's Motion for Summary Judgment, August 2005, there was evidence to support only Plaintiff's allegation that the subject tiles were slippery (Defendant had no evidence to show that the floor was not slippery), summary judgment for Plaintiff should have been granted.

At the time Defendant's Motion for Summary Judgment was filed, five months later, there was evidence supporting both parties' assertions concerning whether the subject tiles were slippery on August 29, 2001, therefore summary judgment for Defendant should

have been denied. Plaintiff's Motion for Reconsideration  
should also have been granted.

Dated this 14<sup>th</sup> day of July, 2006.

Respectfully submitted,

  
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STATE OF WASHINGTON  
BY hdm  
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**COURT OF APPEALS, DIVISION II,  
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Susan Sanders,  
Appellant,

v.

Joel Anderson and Carol  
Anderson, husband and  
wife, and the marital  
community comprised  
thereof,  
Respondents.

CERTIFICATE OF SERVICE

I certify that on the 23rd day of May, 2006, I caused a true and  
correct copy of the following :

Reply Brief of Appellant

to be served on the following counsel in the above-captioned case to:

George Mix  
Law Office of James Richmond  
3315 S. 23rd St., Ste 310  
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Attorney for Defendant

- US Mail postage pre-paid
- facsimile
- messenger service

I declare, under penalty of perjury under the laws to the State of Washington, that the foregoing is true and correct and that this certificate was executed on this 28<sup>th</sup> day of July, 2006, at Silverdale, Washington.

DATED: 7/28/06

Patricia Aycock  
Patricia Aycock