

COURT OF APPEALS,  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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JON C. HOPKINS,  
a single person,

Appellant,

v.

INTERSTATE DISTRIBUTOR CO., a Washington corporation;  
RUSHFORTH CONSTRUCTION CO., INC., a Washington corporation;  
and TUCCI & SONS, INC., a Washington corporation

Respondents.

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APPELLANT'S OPENING BRIEF

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**ORIGINAL**

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## **I. INTRODUCTION**

Appellant is Jon C. Hopkins, a single person.

This appeal concerns a ruling in the trial court below granting summary judgment on behalf of defendants, Rushforth Construction Co., Inc. and Tucci & Sons, Inc. (henceforth “the Contractors”). The plaintiff had asserted in his cause of action that the Contractors had built a defective parking lot owned by another defendant, Interstate Distributor Co. (henceforth “Interstate”), upon which water subsequently pooled and froze, causing the plaintiff severe injury when he fell because of that frozen pool. The plaintiff asserted that the Contractors are subject to liability to him, because the Contractors caused the dangerous character or condition, which caused him physical harm. The trial court’s ruling below was contrary to the holding of *Davis v. Baugh Industrial Contractor’s, Inc.*, 159 Wn.2d 413, 417, 150 P.3d 545 (2007), and the Restatement (Second) of Torts § 385 (1965); both of which control the disposition of this case and both of which were completely disregarded by the trial court below.

## **II. ASSIGNMENTS OF ERROR AND ISSUES**

### **PRESENTED FOR REVIEW**

The plaintiff contends that the trial court erred by granting summary

judgment in favor of the Contractors.

The issues pertaining to the assignments of error are as follows:

1. Did the trial court err in granting summary judgment to the defendants, Rushforth Construction Co., Inc. and Tucci & Sons, Inc.?

2. Did the plaintiff raise a material issue of fact alleging that the Contractors erected a structure or created a condition which caused physical harm to him as a result of the dangerous character of condition of a parking lot built by the Contractors?

### **III. STATEMENT OF THE CASE**

On February 24, 2006, between the hours of 9:00 a.m. and 10:00 a.m., plaintiff, Jon C. Hopkins, went to the business premises of Defendant Interstate to apply for a job as a truck driver. Mr. Hopkins had previously worked for Interstate in that capacity. When Mr. Hopkins was leaving the premises and as he was accessing a parking lot, Mr. Hopkins' right foot slid sideways on a patch of ice and he lost his footing and fell. The fall fractured his right ankle and he sustained other physical injuries as a result of the fall. He is permanently disabled as a result of the fall. He can no longer work as a truck driver as his injuries make this impossible.<sup>1</sup>

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<sup>1</sup>CP 23 (Line 15-17).

The depression in the pavement where the ice formed was built in that defective condition by the Contractors. Rushforth Construction Co., Inc., was the General Contractor. Tucci & Sons, Inc., was the paving contractor.

The parking lot upon which Mr. Hopkins was injured was open to members of the public, such as Mr. Hopkins, and in fact, Mr. Hopkins was directed to the area upon which he fell by the employment recruiter to whom he talked immediately prior to his fall.<sup>2</sup>

The area where the ice formed was in a depression in the blacktop asphalt immediately adjacent to a handicapped access ramp between two handicapped parking stalls.<sup>3</sup> There was a painted area between these handicap parking stalls, as shown in the photographs appended to the Declaration of Mark G. Nordstrom, P.E.<sup>4</sup> Mr. Nordstrom, a forensic engineer, concluded that the “bird bath” in the asphalt which created the pool of water which froze and upon which Mr. Hopkins slipped had been caused by the paving contractor, Tucci, at the time they installed the pavement on the

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<sup>2</sup>CP 23 (Line 19-20).

<sup>3</sup>CP 38 (Par. 3).

<sup>4</sup>CP 48-51.

parking lot.<sup>5</sup> The parking lot had been in service at least since August of 2005.<sup>6</sup> Furthermore, he concludes that the “bird bath” collected water whenever precipitation occurred.<sup>7</sup> The “bird bath” was determined by Mr. Nordstrom to cause water adjacent to the “bird bath” to collect and pool in the “bird bath”.<sup>8</sup> He further concludes that the “bird bath” holds water even long after the surrounding pavement has dried.<sup>9</sup> Thus, it is obvious that the “bird bath” defect in the paving project performed by Tucci was open and obvious to the Contractors from the time the paving project was completed. In fact, the Contractors caused the defective condition in the pavement. See Declaration of Mark Nordstrom. P.E.<sup>10</sup> It was certainly foreseeable by the Contractors at the time they finished their work that a third person (Mr. Hopkins) would be injured due to their creation of the dangerous condition which caused Mr. Hopkins’ injury.

Mr. Nordstrom, at his deposition, elaborated further.

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<sup>5</sup>CP 39 (Par. 3).

<sup>6</sup>CP \_\_\_\_.

<sup>7</sup>CP 39 (Par. 5).

<sup>8</sup>CP 39.

<sup>9</sup>CP 39 (Par. 3).

<sup>10</sup>CP 38-51.

EXCERPT OF THE DEPOSITION OF MARK NORDSTROM  
(Thursday, August 6, 2009)

5 BY MR. CLOUD:

6 Q So if a paver in the process of paving leaves a teacup or  
7 birdbath in the pavement that isn't shown in the plans,  
8 would that be a proper behavior by the paver?

9 A I'd have to say no, in that birdbaths or dead areas, or  
10 whatever you want to call them, are considered an  
11 undesirable condition in a parking lot. Assuming that the  
12 goal of any craftsman or tradesman is to do their job  
13 properly to industry standards and commonly accepted levels  
14 of good work, it's an undesirable condition.

15 Q I don't have any other questions.

16 (End of excerpt.)<sup>11</sup>

**IV. ARGUMENT**

**A. THE TRIAL COURT CLEARLY ERRED BY GRANTING  
SUMMARY JUDGMENT IN FAVOR OF RUSHFORTH  
CONSTRUCTION CO., INC., AND TUCCI & SONS, INC.**

This case is controlled by the case of *Davis v. Baugh Industrial Contractor's, Inc.*, 159 Wn.2d 413, 417, 150 P.3d 545 (2007). Pursuant to *Davis, supra.*, the Contractors in the present case owed to Mr. Hopkins the common law duty of reasonable care, as set forth in Restatement (Second) Torts § 385 (1965). In *Davis, supra.*, the Court abandoned the “completion and acceptance” doctrine. *Id.* at 418, upon which the trial court seemed to rely.

The holding of *Davis, supra.*, and its implication are neatly

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<sup>11</sup>Appendix 1 (Pg. 2).

summarized in the case of *Jackson v. City of Seattle*, 158 Wn.App. 647, 244 P.3d 425 (Wn.App. Div. 1, 2010). In *Jackson, supra.*, the court stated as follows:

*“In Davis, the crew foreman of a concrete company was accidentally crushed to death by falling cement blocks while he was inspecting leaking water pipes. A contractor had installed the pipes, allegedly without using reasonable care. The trial court granted summary judgment to the contractor on the ground that the common law completion and acceptance doctrine relieved the contractor of liability for negligence after the work was completed by the contractor and accepted by the landlord. Abandoning the "ancient" doctrine of completion and acceptance, the court instead employed RESTATEMENT (SECOND) OF TORTS § 385 (1965):*

*§ 385. Persons Creating Artificial Conditions on Land on Behalf of Possessor: Physical Harm Caused After Work has been Accepted One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.*

*Under this section of the Restatement, "a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence." Davis, 159 Wash.2d at 417, **150 P.3d 545.**"*

*Jackson v. City of Seattle*, 158 Wn.App. 647, 656, 244 P.3d 425 (Wn.App.

Div. 1, 2010).

The trial court below erred in not finding an issue of material fact was raised by the plaintiff in regard to the duty of care owed to him by the Contractors. This issue of fact was established by the deposition testimony and Declaration of Mark G. Nordstrom, P.E., in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment.<sup>12</sup> Mr. Nordstrom is a licensed civil engineer who has had substantial experience in evaluation, design and construction of paved surfaces.<sup>13</sup> He acquired this experience through his education as a civil engineer and through his professional experiences.<sup>14</sup>

Mr. Nordstrom is a forensic engineer. Mr. Nordstrom prepared a report, which was incorporated into his declaration as Exhibit "B."<sup>15</sup> Mr. Nordstrom described in his declaration the circumstances which caused the dangerous condition upon which Mr. Hopkins slipped and fell. Mr. Nordstrom declared in his declaration the following:

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<sup>12</sup>CP 38-51.

<sup>13</sup>CP 38 (Par. 2).

<sup>14</sup>CP 38 (Par. 2).

<sup>15</sup>CP 43-51.

*“3. . . . Mr. Hopkins’ slip and fall occurred in a marked area for pedestrians located between two handicapped parking stalls. The depression in the asphalt is what is described as a “bird bath” in industry parlance. This “bird bath” has, on a more probable than not basis, existed since the time the asphalt was installed. This “bird bath” is just west of the handicapped area access ramp. As shown in Figures 1, 6, and 7 appended in my report, this localized low spot will hold water after the surrounding pavement is dry. There is no noted breakdown of the asphalt surface (cracking or fragmentation). This indicates that the pavement’s subgrade is rigid and that the localized depression is not due to settling or shifting under surface loads. Thus, this observed condition indicates that the depression was formed at the time of paving, and has been present the entire time the pavement has been in service.*

...

*5. That the “bird bath” and associated water retention in said “bird bath” where ice formed on the day that Mr. Hopkins’ fell is open and obvious to any observer whenever fluid has been retained in that “bird bath”. This condition has, more probably than not, existed, since the pavement was installed. Undoubtedly, this “bird bath” fills with water whenever water exists on the surrounding pavement. Thus, whenever it rains anymore than a trace, the “bird bath” is filled with water whenever the site receives measurable precipitation.”<sup>16</sup>*

Thus, Mr. Nordstrom concluded that this the “bird bath”, which was the depression that filled with water and then froze to ice upon which Mr. Hopkins fell, was, more probably than not, existed since the pavement was installed. This “bird bath” is a dangerous condition. *“Thus, whenever it rains anymore than a trace, the “bird bath” is filled with water whenever the site*

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<sup>16</sup>CP 39 (Par. 3 and Par. 5).

*receives measurable precipitation.*”<sup>17</sup>

In his report (which was incorporated by reference into his declaration), Mr. Nordstrom stated “the observed condition indicates the depression was formed at the time of paving and is most likely been present the entire time that this facility has been in service.”<sup>18</sup>

Thus, Mr. Nordstrom concluded that the two contractors, Rushforth Construction Co., Inc., and Tucci & Sons, Inc., created the “bird bath” at the time of paving. Thus, the “bird bath” was negligently built by the Contractors and that the Contractors violated their duty of reasonable care. The danger of the “bird bath” being filled with water and then freezing was certainly foreseeable by the Contractors at the time they created and built it. This is particularly the case because the parking lot was built on a one percent grade versus the industry standard of two percent grade.<sup>19</sup> As a result, the parking lot was prone to “bird baths”. In any event, the Contractors should have noticed and remedied this obvious defect. Consequently, the trial court erred in granting the defendant contractors’ motion for summary judgment.

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<sup>17</sup>CP 39 (Par. 5).

<sup>18</sup>CP 39 (Par. 3).

<sup>19</sup>CP 39 (Par. 4).

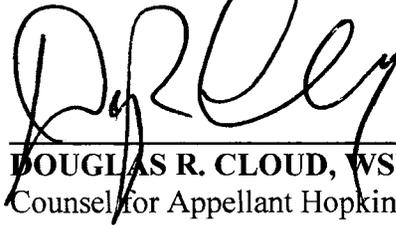
**V. CONCLUSION**

Pursuant to the Restatement (Second) of Torts § 385 (1965), the Contractors are “subject to liability to others . . . for physical harm caused to them by the dangerous character of the structure or condition . . .” Restatement (Second) of Torts § 385 (1965). The facts alleged by plaintiff clearly fit squarely within the Restatement (Second) of Torts § 385 (1965) and allows the imposition of liability upon those who erect or create a dangerous condition on land of another.

Consequently, the Trial Court’s ruling granting summary judgment to the Contractors should be reversed.

**RESPECTFULLY SUBMITTED** this 30<sup>th</sup> day of August, 2011.

**LAW OFFICE OF DOUGLAS R. CLOUD**



Handwritten signature of Douglas R. Cloud in black ink, written over a horizontal line.

**DOUGLAS R. CLOUD, WSBA #13456**  
Counsel for Appellant Hopkins

## **APPENDIX**

1. Excerpt of the Deposition of Mark Nordstrom  
(Thursday, August 6, 2009)



1 (Beginning of excerpt.)

2 MR. CLOUD: I've got a couple questions.

3

4 EXAMINATION

5 BY MR. CLOUD:

6 Q So if a paver in the process of paving leaves a teacup or  
7 birdbath in the pavement that isn't shown in the plans,  
8 would that be a proper behavior by the paver?

9 A I'd have to say no, in that birdbaths or dead areas, or  
10 whatever you want to call them, are considered an  
11 undesirable condition in a parking lot. Assuming that the  
12 goal of any craftsman or tradesman is to do their job  
13 properly to industry standards and commonly accepted levels  
14 of good work, it's an undesirable condition.

15 Q I don't have any other questions.

16 (End of excerpt.)

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No. 41801-1-II

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CERTIFICATE OF SERVICE

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253-627-1505

Attorney for Appellant

**ORIGINAL**

**CERTIFICATE OF SERVICE**

MAILED  
STATE COURT  
BY

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

I am an employee of Douglas R. Cloud, Attorney at Law.

On the 30<sup>th</sup> day of August, 2011, I mailed via United States regular mail, postage prepaid, the documents titled (1) Appellant's Opening Brief and (2) Certificate of Service to the following:

Washington State Court of Appeals (the original and one copy)  
Division II  
950 Broadway, Ste 300  
Tacoma, WA 98402-4454

Gregory G. Wallace, Esq., WSBA #29029  
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2102 N Pearl St, Ste 400  
Tacoma WA 98406-2550

The Appellant's Opening Brief was also faxed to Mr. Wallace and Mr. Dynan on this date.

I declare under penalty of perjury under the laws of the State of

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Washington that the foregoing is true and correct.

**DATED** this 30<sup>th</sup> day of August, 2011.

*Carrie L. Marsh*  

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**CARRIE L. MARSH**