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BY

No. 41801-1-II

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

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.

**APPELLANT'S REPLY TO RESPONDENTS/APPELLEE
RUSHFORTH CONSTRUCTION CO., INC. AND TUCCI & SONS,
INC. RESPONSE IN OPPOSITION TO
PETITIONER/APPELLANT HOPKINS' OPENING BRIEF**

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LEGAL AUTHORITIES

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I. ARGUMENT

Appellant is Jon C. Hopkins, a single person.

Respondents are Rushforth Construction Co., Inc. (henceforth “Rushforth”) and Tucci & Sons, Inc. (henceforth “Tucci”).

The trial court, in making its Order Granting Respondent’s Motion for Summary Judgment and respondents, in their brief, completely ignore the two cogent factors that demonstrate why the Trial Court committed reversible error in holding as it did. The two factors are as follows:

1. Rushforth and Tucci built the parking lot in such a way that a dangerous “bird bath” was created by the respondents at the time of their construction of the parking lot. Thus, Rushforth and Tucci created the hazardous condition which resulted in the Mr. Hopkins’ injuries; and

2. Restatement (Second) of Torts § 385 (1965) states as follows:

“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 the land for physical harm caused to them by the dangerous character of the structure or condition after the work has been accepted by the possessor, under the same rules as those determining the liability of one with the manufacturer independent contractor makes a channel for the use of others.”

Restatement (Second) of Torts § 385 (1965).

Therefore, Rushforth and Tucci created the dangerous condition which caused Mr. Hopkins' injury. There can be no doubt that the Trial Court's decision Granting Respondents' Motion for Summary Judgment was clearly erroneous.

The Trial Court was not entirely clear upon what reasoning it was basing its Order Granting Summary Judgment. But, the court in his oral ruling, mentions two reasons. They are:

1. That the "bird bath" was caused by a design issue; and
2. Rushforth and Tucci did not have notice, either constructive or actual, of the defective condition.¹

The Trial Court seemed to primarily rely on the second reason; lack of notice to Rushforth and Tucci.² The Court did not grant the Motion for Summary Judgment that Interstate Distributor Co. (henceforth "Interstate") had filed because he found Interstate had notice of the defective condition.³ Rushforth and Tucci had argued that lack of notice absolved them⁴ and the

¹RP (Page 17).

²RP (Page 13, lines 9-10), RP (Page 17, lines 10-13).

³RP (Page 17, lines 15-17), RP (Page 18, lines 8-14, 19), RP (Page 28, lines 15-19.)

⁴RP (Page 4, lines 13-16), RP (Page 1, line 13-17).

Trial Court seemed to agree.

The first reason given by the Court is nonsensical. The Court admitted that he might have read Mr. Nordstrom's declaration wrong⁵ and clearly he did not consider it in the light most favorable to Mr. Hopkins. The Court obviously did read the declaration wrong as Mr. Nordstrom did not say the "bird bath" was acceptable or caused by a design defect.

The Trial Court's decision cannot rest upon the purported lack of notice to Rushforth and Tucci as Restatement (Second) of Torts § 385 (1965) does not require notice.

The appellant's expert, Mark Nordstrom, stated clearly in his declaration that the ponding condition in the parking lot, the "bird bath", was, in his opinion, caused by Rushforth and Tucci at the time the construction was performed.

Mr. Nordstrom took measurements at the parking lot, as well as performing tests. He measured a 3/4" depression in the pavement where Mr. Hopkins fell.⁶ Mr. Nordstrom also poured water on the area which revealed

⁵RP (Page 14, line 21).

⁶CP 45.

a slightly elevated “bird bath” where Mr. Hopkins fell.⁷ The “bird bath” continued to hold water after the surrounding area dried.⁸ There was no evidence of shifting or settling of the pavement. The “bird bath” depression was formed at the time of the paving.⁹

Clifford Mass, Ph.D., stated in his declaration that he reviewed weather records for the Tacoma area for the time period, including and preceding Mr. Hopkins’ fall. He reviewed radar data for February 23, 2006, and February 24, 2006, as well as weather records from the adjacent McChord Air Force Base weather station for the same dates.¹⁰

Mr. Mass concluded that it had rained on the parking lot on the evening of February 23, 2006, which resulted in water pooling in the “bird bath”. The skies cleared and the temperature dropped during the early morning hours of February 24, 2006, causing the pooled water to freeze in the “bird bath” depression.¹¹

Mr. Nordstrom, in the fifth paragraph of his declaration, stated as

⁷CP 45.

⁸CP 46.

⁹CP 38-39 (Par. 3).

¹⁰CP 52-53 (Par. 4).

¹¹CP 53 (Par. 6).

follows:

“That the “bird bath” and associated water retention in said “bird bath” 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, the “bird bath” is filled with water whenever the site receives sufficient measurable precipitation.”

Dr. Mass, in his declaration, explained that it had rained the night before, which was followed by freezing weather the following morning.¹²

Thus, the appellant met his burden in the Trial Court below and established an issue of fact pursuant the tort described in Restatement (Second) Torts § 385 (1965).

The Trial Court focused on Paragraph 4 of Mr. Nordstrom’s declaration¹³ on the design issue. The appellant is mystified by the court’s reliance upon this paragraph. The paragraph does not absolve Rushforth and Tucci from liability in any way whatsoever. The Trial Court erred by failing to consider Mr. Nordstrom’s testimony in the light most favorable to Mr. Hopkins.

Apparently, the Trial Court seized upon the following language in

¹²CP 53 (Par. 6, lines 11-20).

¹³CP 39 (Par. 4).

supporting its Order Granting Respondents' Motion for Summary Judgment:

*"Therefore, pavement surfaces with overall design grades less than two (2%) percent are prone to areas of "bird bath" ponding resulting from normal and otherwise acceptable variations in the finished pavement surface."*¹⁴

The Trial Court and Rushforth and Tucci apparently did not read Mr. Nordstrom's report incorporated within his declaration and attached thereto as Exhibit "B". At page 3 of said Exhibit "B" to Mr. Nordstrom's declaration, he states as follows:

"Review of Grading Plans (David Evans and Associates, April 2003, Sheets C10.0 to C12.0)"

The specified pavement slopes are consistently less than the industry recommended minimum of 2%. The design plans specify numerous finished slopes of 1%, and some slopes of less than 1%. There are no spot elevations or slopes specified in the construction plans for the immediate area of the subject event. We measured several locations within 20' of the subject ponding, and found overall slopes of approximately 1%. Precise and comprehensive measurements of the as-built condition relative to the grading plan are beyond the scope of this report."

In summary, Mr. Nordstrom stated in the above cited paragraph, that:

1. No slopes or elevations were specified in the construction plans in the immediate area of Mr. Hopkins' fall;
2. The slopes that were specified in the construction plans varied

¹⁴CP 46.

within those plans throughout the site; and

3. A comparison of the as-built condition at the site of the fall to the grading plan was not performed by Mr. Nordstrom.

Therefore, Rushforth and Tucci apparently chose the slope of the parking lot themselves at the location of the incident as no slopes were specified on the construction plan in that area.

The source of the Trial Court's confusion seems to arise as a result of Mr. Nordstrom stating that, had the grade of the parking lot been over 2%, the finished pavement surface would not be as prone to the "bird bath" ponding as a parking lot built with a lesser grade. That does not absolve Rushforth and Tucci from liability for building the parking lot with this dangerous "bird bath" condition. All Mr. Nordstrom is saying that in parking lots with grades below 2%, there is more of a tendency for "bird bath" ponding. Mr. Nordstrom does not say that this "bird bath" ponding is acceptable at all. What he says is that normal variations in the paving process are less likely to form areas of "bird bath" ponding in parking lots built at a grade greater than 2%.

Mr. Nordstrom is saying that, at a grade greater than 2%, the normal variations in pavement are more prone to drain rather than retain water in a

“bird bath” situation existing in a parking lot with a lower grade.

Thus, what is left of respondents’ argument, as well as the Trial Court’s order, after Rushforth and Tucci’s lack of notice argument is dispensed with seems to rest upon a narrow and unique interpretation of Paragraph 4 of Mr. Nordstrom’s declaration, which ignores the qualifying language of the appended report and which does not in any event absolve Rushforth and Tucci from liability pursuant to Restatement (Second) Torts § 385 (1965) when considered in the light most favorable to Mr. Hopkins.

Mr. Hopkins does not concede that the Trial Court did not consider portions of Dr. Mass’ and Mr. Nordstrom’s testimony. The Court did state it would not consider Mr. Hopkins’ rebuttal brief.¹⁵ The Court did not specify any reason for not considering the supplemental brief. This ruling was an abuse of discretion by the Court.

II. CONCLUSION

The appellant in this matter clearly created an issue of material fact sufficient to survive Respondents’ Motion for Summary Judgment. The fact of the matter is that Rushforth and Tucci created the dangerous condition when they built the parking lot. The dangerous condition, the “bird bath”

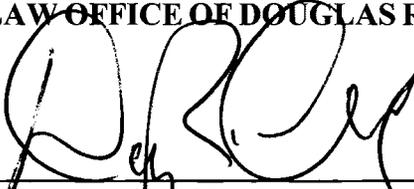
¹⁵RP (Page 16, lines 13-22).

depression, was the proximate cause of the appellant's injury. Rushforth and Tucci clearly did not take the care necessary to construct the project in a safe manner as the "bird bath" depression existed from the time the parking lot was paved by Rushforth and Tucci.

The Trial Court's Order Granting Respondents Rushforth and Tucci's Motion for Summary Judgment should be reversed by this court.

RESPECTFULLY SUBMITTED this 30th day of November, 2011.

LAW OFFICE OF DOUGLAS R. CLOUD



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Counsel for Appellant Hopkins

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DATE: _____
FILED: _____
NOV 30 2011
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 30th day of November, 2011, I mailed via United States regular mail, postage prepaid, the documents titled (1) Appellant’s Reply to Respondents/Appellee Rushforth Construction Co., Inc. and Tucci & Sons, Inc. Response in Opposition to Petitioner/Appellant Hopkins’ Opening Brief and (2) Certificate of Service to the following:

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The Appellant’s Reply to Respondents’ 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 Washington that the foregoing is true and correct.

DATED this 30th day of November, 2011.


CARRIE L. MARSH