NO. 41801-1-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

JOHN C. HOPKINS,
A single person,

Appellant,

vs.

INTERSTATE DISTRIBUTOR CO., a Washington Corporation;
RUSHFORTH CONSTRUCTION CO., INC., a Washington Corporation;
And TUCCI & SONS, INC., a Washington Corporation;

Respondents

BRIEF OF RESPONDENT INTERSTATE DISTRIBUTOR CO.

Mark J. Dynan, WSBA #12161
GIERKE, CURWEN, P.S.
Suite 400, Building D
2102 North Pearl Street
Tacoma, WA 98406-1600
(253) 752-1600
Attorneys for Respondent, Interstate

ORIGINAL

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I. INTRODUCTION

Respondent Interstate Distributor Co. ("Interstate") joins in the brief of appellant Jon C. Hopkins ("Hopkins").

II. ASSIGNMENTS OF ERROR

Respondent Interstate adopts by reference the Assignments of Error and Issues Presented for Review by appellant Hopkins.

III. STATEMENT OF THE CASE

Respondent Rushforth Construction Co., Inc. ("Rushforth") is a general contractor who, on September 8, 2003, entered into a contract with Interstate and Mt. Tahoma Leasing. CP 6:20-22. The contract included paving Interstate's parking lot, which Rushforth subcontracted to respondent Tucci & Sons, Inc. ("Tucci"). CP 6:22-23 and CP 8:22-23.

Hopkins alleges that on the morning of November 24, 2006, he slipped and fell on a patch of ice in Interstate's parking lot. CP 23:11-15. Hopkins asserts that the parking lot was paved in a negligent manner, which resulted in a depression in the surface of the pavement. CP 27:2-6. Hopkins alleges that rainwater pooled in the depression then froze creating a patch of ice on which Hopkins slipped and fell. CP 24:22-26.

On February 6, 2009, Rushforth and Tucci brought a motion for summary judgment on the grounds that Hopkins had no evidence that either Rushforth or Tucci was negligent or that their negligence, if any,

was the cause of Hopkins' fall. CP 4:5-6. Rushforth and Tucci acknowledged that "[i]n a premises liability claim, the plaintiff must establish that the defendant either ***caused*** the dangerous condition or knew or should have known of its existence in time to remedy the situation." CP 4:12-14 (emphasis added). Rushford and Tucci did not deny that they created the depression in the parking lot. Instead, they argued they were not ***informed*** of any problems or defects relating to the pavement and they were not aware of the particular ice patch on which Hopkins fell. CP 7:2-5 and CP 9:4-8.

On August 13, 2009, Hopkins filed a response to the motion for summary judgment, which was supported by the declarations of civil engineer Mark G. Nordstrom and meteorologist Clifford F. Mass, Ph.D.

Mark Nordstrom's declaration and attached report dated July 29, 2009, indicate that he went to the parking lot, took measurements and performed tests. He measured a 3/4" deep depression in the surface of the pavement where Mr. Hopkins fell. CP 45. Mr. Nordstrom applied surface water to the area, which revealed a slightly elevated "birdbath" depression in the pavement where the accident occurred. CP 45. The birdbath held water after the surrounding area dried. CP 46. Mr. Nordstrom concluded on a more probable than not basis that the birdbath depression was formed

at the time of paving as there was no evidence of shifting or settling of the pavement. CP 38-39 at paragraph 3.

Clifford Mass' declaration indicates that he reviewed weather records for the Tacoma area including records from the weather station at McChord Air Force Base, which is adjacent to where Hopkins fell. CP 52 at paragraph 4. He also reviewed weather radar data for February 23, 2006 and February 24, 2006. CP 52-53 at paragraph 4. Mr. Mass concluded that it had rained on February 23, 2006, which caused rainwater to pool in the birdbath depression, and that temperatures dropped below freezing during the early morning hours of February 24, 2006, which caused the water to freeze. CP 53 at paragraph 6.

IV. ARGUMENT

On appeal from grant of summary judgment, all facts and reasonable inferences must be considered in a light most favorable to the nonmoving party, and all questions of law are reviewed *de novo*. *Washington State Bank v. Medalia Health Care L.L.C.*, 96 Wash.App. 547, 553, 984 P.2d 1041, 1044, review denied 140 Wash.2d 1007, 999 P.2d 1261 (1999). In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment. *J.N. By and Through Hager*

v. Bellingham School Dist. No. 501, 74 Wash.App. 49, 61, 871 P.2d 1106, 1113 (1994).

When construed in the light most favorable to Hopkins, the declarations of civil engineer Mark Nordstrom and meteorologist Clifford Mass establish that Rushford and Tucci paved the parking lot in such a manner as to create a depression in the surface of the parking lot, which caused rainwater water to pool. The rainwater froze when temperatures dropped, creating a patch of ice that caused Hopkins to slip and fall. The declarations of Nordstrom and Mass raise genuine issues of material fact, which preclude summary judgment.

In addition, Rushforth and Tucci acknowledged that "[i]n a premises liability claim, the plaintiff must establish that the defendant either ***caused*** the dangerous condition or knew or should have known of its existence in time to remedy the situation." (emphasis added). Rushforth and Tucci did not deny that they created the birdbath depression in the pavement.

It is not relevant that the paving work was completed and accepted prior to Hopkins' accident. In *Davis v. Baugh Industrial Contractors, Inc.*, 159 Wash.2d 413, 150 P.3d 545 (2007), the Washington Supreme Court rejected the common law doctrine of completion and acceptance. "We conclude that the doctrine of completion and acceptance is

outmoded, incorrect, and harmful and join the modern majority of states that have abandoned it in favor of the *Restatement* approach." *Id.* 159 Wash.2d at 421, 150 P.3d at 548-549.

The Restatement (Second) of Torts § 385 (1965), "Persons Creating Artificial Conditions on Land on Behalf of Possessor: Physical Harm Caused After Work has been Accepted," provides:

> 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.

In the present case there are material questions of fact as to whether Rushforth and Tucci were negligent in paving the parking lot and whether such negligence was the proximate cause of Hopkins' injuries. Breach of duty and proximate cause are generally questions of fact for the jury. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wash.2d 265, 275, 979 P.2d 400, 406 (1999); *Richland School Dist. v. Mabton School Dist.*, 111 Wash.App. 377, 389, 45 P.3d 580, 588 (2002). Accordingly, the trial court erred in granting Rushforth and Tucci's motion for summary judgment.

V. CONCLUSION

For the reasons set forth above, the trial court's granting of summary judgment in favor of Rushforth and Tucci should be reversed, and the Order Granting Defendant Rushforth Construction, Inc.'s and Tucci & Sons, Inc.'s Motion for Summary Judgment, filed August 28, 2009, should be vacated.

DATED this 20 day of October, 2011.

Respectfully submitted,

GIERKE, CURWEN, P.S.

By_____
Mark J. Dynan, WSBA #12161
Attorney for Respondent
Interstate Distributor Co.

GIERKE, CURWEN, P.S.
2102 North Pearl Street
Suite 400, Building D
Tacoma, WA 98406-1600

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STATE OF WASHINGTON
BY
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CERTIFICATE OF SERVICE

Mark J. Dynan, WSBA #12161
GIERKE, CURWEN, P.S.
Suite 400, Building D
2102 North Pearl Street
Tacoma, WA 98406-1600
(253) 752-1600
Attorneys for Respondent, Interstate

ORIGINAL

CERTIFICATE OF SERVICE

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 Mark J. Dynan of the firm of Gierke Curwen, PS, attorneys at law.

On the 20th day of October, 2011, I instructed for personal delivery via ABC Legal Services the documents entitled (1) Brief of Respondent Interstate Distributor Co., and (2) Certificate of Service to the following:

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

Douglas R. Cloud, Esq. WSBA #13456
Law Offices of Douglas R. Cloud
901 South I Street, Suite 101
Tacoma, WA 98101

Gregory G. Wallace, Esq., WSBA #29029
Law Offices of William J. O'Brien
999 Third Avenue, Suite 805
Seattle, WA 98104-4019

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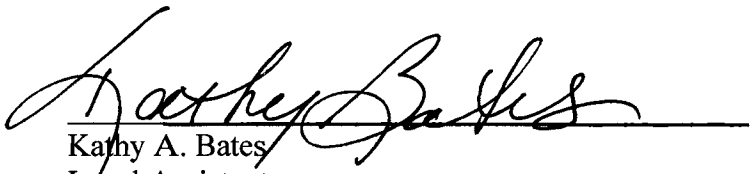
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of October, 2011.



Kathy A. Bates
Legal Assistant

GIERKE, CURWEN, P.S.
2102 North Pearl Street
Suite 400, Building D
Tacoma, WA 98406-1600