

No. 41801-1-II

COURT OF APPEALS,
DIVISION II
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.

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

Gregory G. Wallace, WSBA No. 29029
Attorneys for Rushforth Construction Co., Inc.
and Tucci & Sons, Inc.
Law Office of William J. O'Brien
999 Third Avenue, Suite 805
Seattle, WA 98104
(206) 515-4800

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii - iv
I. STATEMENT OF ISSUE.....	1
II. STATEMENT OF CASE.....	1
a. Basic Facts.....	1
III. SUMMARY OF ARGUMENT	2
IV. ARGUMENT	3
1. Standard of Review.....	3
2. Hopkins' Failure of Proof.....	4
3. Striking of Expert Testimony & Supplemental Brief.....	6
4. Interstate Response Brief.....	8
V. CONCLUSION.....	9

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Almquist v. Finely School District</i> , 114 Wn. App. 395, 57 P.3d 1191 (2002).....	4
<i>Bernal v. American Honda Motor Co.</i> , 87 Wn.2d 406, 412, 553P.2d 107 (1976).....	7
<i>Burg v. Shannon & Wilson, Inc.</i> , 110 Wn. App. 798, 43 P.3d 526 (2002).....	4
<i>Davis v. Baugh Industrial Contractors, Inc. et al</i> , 159 Wn.2d 413, 150 P.3d 545 (2007).....	4 & 5
<i>Doe v. Puget Sound Blood Center</i> 117 Wn.2d 772, 819 P.2d 370 (1991).....	8
<i>Electrical Workers v. Trig Electric</i> , 142 Wn.2d 431, 13 P.3d 633 (2000).....	3
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	3
<i>Hontz v. State</i> , 105 Wn.2d 302, 714 P.2d 1176 (1986).....	3
<i>Jackson v. City of Seattle & Trenchless Construction, et al.</i> , 158 Wn.App. 647, 244 P.3d 425 (2010).....	4 & 5
<i>Marks v. Benson</i> , 62 Wn. App. 178, 813 P.2d 180, review denied, 118 Wn.2d 1001, 822 P.2d 287 (1991).....	8
<i>Marshall v. AC & S, Inc.</i> , 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).....	8
<i>Meadows v. Grant's Auto Brokers, Inc.</i> , 71 Wn.2d 874, 878, 431 P.2d 216 (1967).....	7
<i>McBride v. Walla Walla County</i> , 95 Wn. App. 33, 975 P.2d 1029 (1999).....	8

<i>McCoy v. American Suzuki Motor Corp.</i> , 136 Wn.2d 350, 357, 961, P.2d 952 (1998).....	4
<i>McKee v. American Home Products</i> , 113 Wn.2d 701; 782 P.2d 1045 (1989).....	8
<i>Melville v. State of WA</i> , 115 Wn2d 34, 793 P.2d 952 (1990).....	8
<i>Nordstrom v. White Metal Rolling & Stamping Corp.</i> , 75 Wn.2d 629, 453 P.2d 619 (1969).....	7
<i>Overton v. Consolidated Ins. Co.</i> , 145 Wn. 2d 417, 38 P.3d (2002).....	8
<i>Young v. Key Pharmaceuticals</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	4
<i>Wilson v. Northern Pacific Railway Co.</i> , 44 Wn2d, 122, 265 P.2d 815 (1954).....	4
STATUTES:	
Restatement (Second) of Torts, 385.....	5

I. STATEMENT OF ISSUE

The trial court correctly granted Respondents/Appellees Rushforth Construction Co., Inc. and Tucci & Sons, Inc.'s ("Rushforth & Tucci") motion for summary judgment when it determined that there were no genuine issues of material fact, and that Rushforth & Tucci were entitled to judgment as a matter of law.

The trial court did not commit reversible error, and did not abuse its discretion.

II. STATEMENT OF CASE

A. Basic Facts: This is a personal injury premises liability case. On February 24, 2006, Hopkins was a business invitee of Respondent Interstate Distributing Co. ("Interstate"), and was on its premises for the purpose of applying for employment. As he was leaving the building, and walking to the parking lot, Hopkins slipped on a patch of ice on the parking lot area or premises of Interstate. (CP 14, lines 10 – 13).

Hopkins alleges that both Rushforth and Tucci were negligent for failing to properly pave and/or otherwise resurface the parking lot at issue, and that its respective negligence was a proximate cause of Hopkins' fall and resultant injuries. (CP 15, lines 4 – 24). In its Answer to Hopkins' Complaint (CP 18 - 21), Rushforth and Tucci denied all allegations of negligence & proximate cause.

Rushforth is a general contractor. On September 8, 2003, Rushforth contracted with defendant Interstate and Mt. Tahoma Leasing, to construct several buildings and perform site work at the location of Hopkins' fall. The contract included paving, which Rushforth

subcontracted to Tucci. Rushforth's and Tucci's contracted work was completed long before Hopkins' fall. (CP 6 – 9)

David Evans & Associates was the civil engineering firm responsible for the grade design of the parking lot areas. David Evans & Associates was retained directly by the owner, Interstate. The grade design of the parking lot areas, which includes the area where plaintiff Hopkins fell, **was not within** Rushforth or Tucci's scope of work outlined in the respective contracts. (CP 75)

Since completing their respective work, neither Rushforth nor Tucci were ever informed about or notified by Interstate that there were problems with the paving or parking lot surface. As to the specific patch of ice on which Hopkins claims he fell, neither Rushforth nor Tucci were ever notified informed about it. Neither Rushforth nor Tucci were ever informed by Interstate about any patch of ice. (CP 6 – 9)

III. SUMMARY OF ARGUMENT

1. Summary Judgment Standard: This court's review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. If the pleadings, depositions, admissions on file and the affidavits submitted demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, then summary judgment is proper.

2. Hopkins' complete failure of proof: The trial court correctly granted Rushforth & Tucci's motion for summary judgment. Hopkins' arguments on appeal, and his focus on the abolishment of the completion and acceptance doctrine, are completely misplaced. The trial court granted judgment in favor of Rushforth & Tucci because there was

no evidence of negligence to support Hopkins' allegations that Rushforth & Tucci's work was a proximate cause of Hopkins' fall.

3. Striking of portions of Hopkins' Experts' Declarations & his Untimely Supplemental Brief: The trial court did not abuse its discretion when it struck, or did not consider, portions of the declarations of Hopkins' two (2) experts, Mark Nordstrom, P.E., and Clifford Mass, Ph.D. (CP 38 – 39 & CP 52 & 53 respectively) The trial did not abuse its discretion when it did not consider Hopkin's Untimely Supplemental Brief. (CP 89 – 100)

4. Response Brief of Interstate: Having not filed a response in opposition to Rushforth & Tucci's underlying summary judgment motion, Interstate cannot now file a Brief in support of Hopkins' appeal.

IV. ARGUMENT

1. Summary Judgment Standard: This court's review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-435, 13 P.3d 633 (2000). In a summary judgment proceeding, the reviewing court makes the same inquiry as the trial court. *Hontz v. State*, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986). If the pleadings, depositions, admissions on file and the affidavits submitted demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, then summary judgment is proper. CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). A moving defendant may satisfy its burden by showing that there is an absence of evidence to support the non-moving party's case. The moving party is entitled to summary judgment when the non-

moving party fails to make a sufficient showing on an essential element of its case in which it has the burden of proof. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

2. Hopkins' Complete Failure of Proof: Hopkins' appeal is completely without merit. The trial court correctly dismissed Hopkins' case against Rushforth & Tucci on the basis that there was simply no evidence to support the allegations of negligence.

To show actionable negligence, Hopkins must establish: (1) the existence of a duty owed; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury. *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 43 P.3d 526 (2002).

To establish proximate cause in a negligence action, Hopkins must show that Rushforth & Tucci's actions were both the cause in fact, "but for" causation, and legal cause of his injuries. *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 357, 961, P.2d 952 (1998). The casual connection between defendant's actions and the alleged injury must not be left to surmise, speculation, or conjecture. *Wilson v. Northern Pacific Railway Co.*, 44 Wn.2d, 122, 127-128, 265 P.2d 815 (1954); *Almquist v. Finely School District*, 114 Wn. App. 395, 57 P.3d 1191 (2002).

Rushforth & Tucci do not dispute that the completion and acceptance doctrine has been abolished under Washington common law. *Davis v. Baugh Industrial Contractors, Inc. et al*, 159 Wn.2d 413, 150 P.3d 545 (2007), and *Jackson v. City of Seattle & Trenchless Construction, et al.*, 158 Wn.App. 647, 244 P.3d 425 (2010)

Rushforth & Tucci do not dispute that Washington courts have adopted 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

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." *Jackson, 158 Wn. App at 656*, citing *Davis, 159 Wn.2d at 417*.

This begs the question. What did Rushforth & Tucci do wrong? How was Rushforth & Tucci negligent in paving and/or resurfacing the parking lot as alleged in the Complaint (CP 15)? What evidence has Hopkins' put forth to support his allegations of negligence?

Hopkins retained expert Mark Nordstrom, P.E. In his Declaration submitted in support of Hopkins' opposition to Rushforth & Tucci's motion for summary judgment, Nordstrom states, "...the specified design pavement grades in the parking lot are consistently less than the generally accepted industry minimum of two (2%) percent. Due to the nature of the asphalt paving process (materials, methods and equipment), minor variations in the finished surface are unavoidable. Therefore, pavement surfaces with overall design grades less than two (2%) percent are prone to

areas of “bird bath” ponding resulting from normal or otherwise acceptable variations in the finished pavement surface.” (CP 39, paragraph 4)

Hopkins’ expert places fault on the grading design. Rather than placing blame, Nordstrom essentially exonerates the paving contractor, here Tucci, stating that because of the grading design, **minor variations in the finished paving surface are unavoidable.** Other than concluding that the grading design (of the parking lot area) was deficient, Hopkins’ expert does not say anything about Rushforth.

Hopkins completely misstates and misrepresents the opinions of his expert.

Contrary to the conclusory assertions in Hopkins’ opening brief, Nordstrom does **NOT** conclude that the “bird bath” at issue was a defect in the “paving.” As outlined above, Nordstrom says exactly the opposite, and exonerates Tucci.

Contrary to the conclusory assertions in Hopkins’ opening brief, Nordstrom does **NOT** state that Tucci or Rushforth created the “bird bath” at the time of paving. He does **NOT** say that the “bird bath” was negligently constructed.

The bottom line: David Evans & Associates was the civil engineering firm responsible for the grade design of the parking lot areas. David Evans & Associates was retained directly by the owner, Interstate. **The grade design of the parking lot areas, which includes the area where plaintiff Hopkins fell, was not within Rushforth or Tucci’s scope of work outlined in the respective contracts.** (CP 75)

Hopkins' expert, Nordstrom says that the parking lot grade/grading design was the culprit, **not the paving itself**. Neither Rushforth nor Tucci were responsible for the grading design of the parking lot area, inclusive of the location of Hopkins' fall. The parking lot grading design work was done by David Evans & Associates, who was retained directly by Interstate.

So, without evidence to support his allegations of negligence against either Rushforth or Tucci, Hopkins' claims fail, and the trial court did not err in granting judgment in favor of Rushforth and Tucci. **Hopkins has simply failed to meet his burden of proof.**

3. Striking of Hopkins' Expert Testimony and Hopkins' Untimely Supplemental Brief: The trial court did not abuse its discretion when striking, or not considering portions of the Declarations of Clifford Mass, Ph.D. and Mark Nordstrom, P.E. The trial court did not abuse its discretion in not considering Hopkins' Untimely Supplemental Brief (CP 89 – 100).

Any declaration in support of CR 56 must (1) be made on personal knowledge, (2) set forth admissible evidentiary facts, and (3) affirmatively show that the affiant is competent to testify to the matters stated therein. *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 412, 553 P.2d 107 (1976); *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 878, 431 P.2d 216 (1967). Competency to testify can reasonably be found by the trial court. *Bernal*, at 413. Furthermore, "the qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion." *Bernal*, at 413, quoting *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d

629, 642, 453 P.2d 619 (1969). See also *McKee v. American Home Products*, 113 Wn.2d 701; 782 P.2d 1045 (1989) The trial court will not abuse its discretion by excluding an affidavit because it contains conclusory assertions rather than factual allegations. *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999). Unsupported conclusional statements and legal opinions cannot be considered in a summary judgment motion. *Marks v. Benson*, 62 Wn. App. 178, 813 P.2d 180, review denied, 118 Wn.2d 1001, 822 P.2d 287 (1991). Lastly, self serving declarations will not create an issue of fact when the declarations contradict or do not comport with previous sworn testimony. *Overton v. Consolidated Ins. Co.*, 145 Wn. 2d 417, 430, 38 P.3d (2002); *Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

The opinion of an expert which is only a conclusion or which is based on assumptions is not evidence which satisfies summary judgment standards because it is not evidence which takes a case to the jury. *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1991). See also, *Melville v. State of WA*, 115 Wn2d 34, 793 P.2d 952 (1990). Mark Nordstrom's statement in his declaration that "Undoubtedly, this "bird bath" fills with water whenever water exists on the surrounding pavement." (CP 39, paragraph 5) of Nordstrom Declaration, attached in support of Hopkins' Response)

The Declaration of Clifford Mass, Ph.D. contains similar conclusions, specifically that Hopkins slipped on a puddle of rain water which had froze after the rain stopped and the temperatures declined below freezing..." (CP 53, paragraph 6). These statements are complete speculation and conjecture. Moreover, both statements are not based on

personal knowledge. The portions of both the Nordstrom Declaration and Mass Declaration which contain 1) conclusions of law, 2) speculation, and 3) assertions not based on personal knowledge were stricken, or not considered by the trial court. Mass has no idea how the ice formed on the day in question. Someone could have spilled water. Hopkins presented no evidence of how the ice was formed, or how long it had been there.

4. Interstate's Response Brief: Interstate's Response Brief in support of Hopkins' motion should not be considered by the Court of Appeals. Interstate never filed an opposition to Rushforth & Tucci's underlying summary judgment motion. Moreover, Interstate's Response Brief contains no evidence of negligence on the part of Rushforth & Tucci such that the court of Appeals should reverse the trial court's judgment in favor of Rushforth & Tucci.

V. CONCLUSION

For the foregoing reasons, the trial court's dismissal of Hopkins' claims against Rushforth and Tucci should be upheld without hesitation. Hopkins' appeal is completely without merit.

Respectfully submitted this 31st day of October 2011

LAW OFFICE OF WILLIAM J. O'BRIEN

By: 

Gregory G. Wallace, WSBA 29029
Counsel for Respondent Rushforth &
Tucci

No. 41801-1-II

COURT OF APPEALS,
DIVISION II
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.

CERTIFICATE OF SERVICE

Gregory G. Wallace, WSBA No. 29029
Attorneys for Rushforth Construction Co., Inc.
and Tucci & Sons, Inc.
Law Office of William J. O'Brien
999 Third Avenue, Suite 805
Seattle, WA 98104
(206) 515-4800

TO: Clerk of the Court

And TO: All Parties and Counsel of Record.

The undersigned declares as follows:

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

On the 31st day of October, 2011, I caused to be file a true and correct copy of Respondents Rushforth Construction Co., Inc. and Tucci & Sons, Inc.'s Response in Opposition to Petitioner/Appellant Hopkins' Opening Brief and delivered a copy to the following counsel of record as indicated:

Counsel for Jon C. Hopkins

Douglas R. Cloud
Law Office of Douglas R. Cloud
901 South "I" St., Suite 101
Tacoma, WA 98405

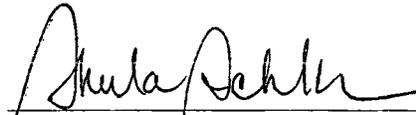
- U.S. Mail
- Legal Messenger
- Facsimile
- Overnight Mail
- Email W/Approval

Mark J. Dynan
Kimberly J. Cox
Gierke Curwen Dynan & Jones, PS
2102 N. Pearl St., Bldg. D., Suite 400
Tacoma, WA 98406-2550

- U.S. Mail
- Legal Messenger
- Facsimile
- Overnight Mail
- Email W/Approval

Signed and dated at Seattle, Washington this 31st day of October, 2011

LAW OFFICE OF WILLIAM J. O'BRIEN



Sheela Schlorer