CASE NO.: 34549-1

FILED

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION III

CACCHIOTTI PROPERTIES, LLC, a Washington limited liability company

Plaintiff/Appellee

v.

BRADLEY PHILLIPS and JANE DOE PHILLIPS, husband and wife, dba DESERT SUN LANDSCAPING and DEVELOPERS SURETY AND INDEMNITY COMPANY, an Iowa Corporation

Defendant/Appellant

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
COUNTY OF GRANT

BRIEF OF APPELLANT

December 2, 2016

Shane L. Kenison
Bar No.: 19613
Attorney for Appellant
404 South Division
Moses Lake, WA 98837

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 2

IV. FACTUAL BACKGROUND 3

V. ARGUMENT 7

VI. CONCLUSION 12

TABLE OF AUTHORITIES

Northwest Independent Forest Manufacturers v. The Department of Labor and Industries, 78 Wash.App 707, 713-714 (1995).....8, 11

Ranier View Court Homeowners Assn Inc v. Zeaker.
157 WN APP 710, 719, 328 P.3d 1217 (2010).....13

I. ASSIGNMENTS OF ERROR

1. The trial court erred in not dismissing the case at the close of CACCHIOTTI's case.

2. The trail court erred in finding for CACCHIOTTI when CACCHIOTTI testified he did not know of any act or omission to act by PHILLIPS that caused the fountain to not work.

3. The trial court erred in entering Findings of Fact VI and VII.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Should the court have dismissed the breach of contract action where CACCHIOTTI failed to provide any evidence with respect to the causation of the breach?

AND/OR

2. Should the court have dismissed the breach of contract action where CACCHIOTTI testified that he did not know what act or omission to act of PHILLIPS caused the breach.

3. Did the Court err in entering Findings of Fact VI and VII in light of the evidence admitted at trial?

III. STATEMENT OF THE CASE

The Complaint for Money Judgment (CP 1-8) was filed October 15, 2013 by Cacchiotti Properties, LLC (hereinafter CACCHIOTTI) and Response (CP 9-11) filed by Bradley Phillips (hereinafter PHILLIPS).

A bench trial was held before the Honorable Harry Ries, Judge Pro Tem on April 27, 2016.

The Complaint for Money Damages (CP 6) sets forth one (1) cause of action:

> 4.1 The acts or omissions of Desert Sun (Phillips) constitutes a breach of the parties contract for services which breach is the actual and proximate cause of damages suffered by Cacchiotti in the amount of $ 13,541.45 plus any applicable interest, plus any cost for demolition/repair of the damaged structure, all of which will be made more certain at trial.

An Order Denying Plaintiff's Motion for Summary Judgment and Specifying Facts That Appear Without Substantial Controversy was entered on March 4, 2016 establishing the following facts:

1. Plaintiff and Defendant entered into a contract for a properly constructed and working water fountain for which Defendant has been paid in full.
2. Defendant selected the method of construction for the fountain to be provided to Plaintiff.
3. Defendant selected the structural components for constructing the fountain to be provided to Plaintiff.

4. Plaintiff only provided input into the aesthetic feature of the fountain.
5. There is currently a large crack running across the concrete pad of the fountain.
6. The fountain pad must be replaced in its entirety in order to correctly color match.
7. Defendant never witnessed anyone other than Defendant or Defendant's employees attempt to clean out the fountain orifice.
8. No pictures of the tube forced below the concrete were ever taken by Defendant or Defendant's employees.

Counsel for CACCHIOTTI references the Order Denying Plaintiff's Motion for Summary Judgment and Specifying Facts That Appear Without Substantial Controversy during closing arguments at trial, RP

IV. Factual Background

The contract was for the construction of a fountain at CACCHIOTTI's new place of business. The business office itself was still under the later phase of construction with seven or eight subcontractors finishing up for an opening in mid-September.

The fountain itself consisted of a single flat concrete slab six (6) inches thick (RP 94 line 9-10) on top of six (6) inches of compacted five eighths (5/8) inch gravel (RP 89 line 17-18) with one-half (½) inch rebar grid on twelve (12) inch centers (RP 94 line 2) with seven (7) openings which emitted seven (7) continuous streams of water in arches which landed back on the concrete slab and were

channeled back through drains (2) to a sump box where a single pump pushed the water back through the seven (7) ball valve controlled lines to the seven (7) openings.

CACCHIOTTI called two (2) witnesses to the stand, Dr. Cacchiotti, owner of Cacchiotti Properties LLC, and Brad Phillips.

CACCHIOTTI testified that the fountain was completed and paid for on July 16, 2013 (RP 26 line 11-20; RP 50 line 12-18) and after testing and adjustment to the nozzles the fountain was on for up to five (5) hours daily, except weekends, until July 25, 2013 (RP 51 line 6-16) and that all the nozzles worked (RP 51 line 11-13).

CACCHIOTTI texts PHILLIPS on July 25, 2013 "Hey one of the nozzles isn't working". PHILLIPS texts back telling CACCHIOTTI he will have his employee, Travis (also PHILLIPS brother), get over to take a look (RP 54 line 9-16).

Travis Phillips and PHILLIPS went to fix the problem on July 26, 2013, a Friday, only to discover that CACCHIOTTI's office was closed and there was no way to turn on the fountain as the switch was inside the office building (RP 55 line 20-56, 14)

The following Monday, CACCHIOTTI texts PHILLIPS that the nozzle next to the one he complained about on the previous Thursday was also acting up (RP 57 line 17)

Travis Phillips was supposed to have shown up on the following Monday July 29, 2013, but could not make it. He and PHILLIPS show up on Tuesday July 30, 2013 (RP 105 lines 3-20)

CACCHIOTTI testified on cross examination in response to questions on when was Travis Phillips at the fountain to fix it, CACCHIOTTI responds:

> A: So from—My assumption here is he came on the 29th and fixed whatever the issue was temporarily.
> Q: Did you see him there on the 29th ?
> A: Well that's what we talked about earlier and I think I recall Travis being there at lunchtime.
> Q: But it could have been the 30th ?
> A: Could have. Absolutely could've.

RP 61 lines 9-17

PHILLIPS and Travis Phillips fix the fountain on July 30, 2013 and PHILLIPS tells CACCHIOTTI on the 30th that the fountain was getting plugged up with dirt from an electrical trench which CACCHIOTTI had dug around two (2) sides of the fountain (RP 107 lines 16-23). The overburden was piled partly on the concrete pad. CACCHIOTTI denies there was ever any dirt on the concrete pad (RP 40 line 2-3)

PHILLIPS testified that the way to fix the fountain was to back flush the system from the nozzle back to the sump using a garden hose and then vacuum out the dirt and rocks and restart the fountain (RP 106 line 3-107 line 15).

CACCHIOTTI denies he was ever told that the dirt on the pad was the problem (RP 57 line 10-15).

CACCHIOTTI testified that the fountain ran from the 30th of July to the 19th of August without further problems (RP 63 line 2-17). On August 19, 2013 CACCHIOTTI contacts PHILLIPS to complain that the same nozzle is not working properly: "Hey, Brad, same nozzle acting up. The waters fluctuating like its not getting enough" (RP 112 line 1-2). PHILLIPS response to CACCHIOTTI via text is: "It's the sediment off the concrete" (RP 58 line 1-3)

CACCHIOTTI testified he did not know what PHILLIPS was referring to in the text advising him that the problem was "… the sediment from the concrete" (RP 58 line 4-23)

When PHILLIPS arrives on the 19th of August to backflush the fountain the pad is cracked through and through.

V. ARGUMENT

1. The trial court erred in not dismissing CACCHIOTTI's case at the close of CACCHIOTTI's case.

    a. CACCHIOTTI testified that he did not know what PHILLIPS did or did not do that caused the failure of the fountain (RP Page 64, Lines 10-65, line 6). CACCHIOTTI bears the burden of proof as to each element of his breach of contract action. If CACCHIOTTI does not know what caused the break in the concrete and provides no evidence as to how it broke the court cannot find by a preponderance of the evidence that PHILLIPS bears the fault.

    b. The element of breach of a duty owed to CACCHIOTTI necessarily requires proof of how PHILLIPS breached the contract, by what act or omission to act. To simply say, as CACCHIOTTI testified here, when asked what PHILLIPS did or did not do that caused the failure of the fountain (RP Page 64, Lines 10-13), CACCHIOTTI responded, "A. He didn't provide a working fountain" (RP Page 64 line 14). That is, in essence, strict liability. That in essence shifts the burden of proof without establishing how PHILLIPS breached his duty and places PHILLIPS in the impossible position of defending his actions or failures to act

without any specific allegation as to the exact action or failure to act.

2. Law

a. The elements of a breach of contract action.

"In Washington, to state a claim for breach of contract a party must establish duty, breach of duty, and damages proximately resulting from the breach" Northwest Independent Forest Mfrs. V. Department of Labor and Industry, 78 Wn App. 707, 712, 899 P.2d 6 (1995). That PHILLIPS had a duty to construct a working fountain/water feature is not at issue. How, or if, PHILLIPS violated that duty is the crux of this appeal.

CACCHIOTTI offered no evidence of PHILLIPS's act or omission which led to the cracked concrete in the water feature. Rather, CACCHIOTTI mentioned two possible theories at trial for the cause of the damage to the water feature including design defect and failure to continuously supervise and monitor/safeguard the fountain after completion because CACCHIOTTI continued to have subcontractors (electricians, landscaping) working on or near the finished water feature.

"Every time there's a mistake, Dr. Cacchiotti contacts Mr. Phillips, "Come take a look at this. It's not working." Well, Mr. Phillips says

> it's, it's, it's sediment that cause the problem. Well, if that's true, maybe he should've said "When I come up there to fix it, he should've put some tape around it," or, or told people, "Don't' get on there, don't go anywhere near here." He knew, admittedly he knew by his testimony there was other construction going on, there was other contractors, there was likely, according to his own testimony, he saw a dirt trench next to him. He should've done something to stop it He knew there was going to be continued people, ***it was his obligation to make sure that his fountain didn't get disturbed***. My client wasn't even practicing at that time, he was in his old building, he hadn't moved over there yet, he was still on—under the process." (Emphasis added)

RP, page 233 lines 15-234, page 234 lines 1-7

CACCHIOTTI's Complaint for Money Judgment (CP 6) serves as the only indication of PHILLIPS failure with respect to the fountain.

> "The acts or omissions of Desert Sun constitute a breach of the parties contract for services, which breach is the actual and proximate cause of damages suffered by Cacchiotti, in the amount of $ 13,541.45 plus any applicable interest plus any cost for demolition/repair of the damaged structure, all of which will be made more certain at trial."

In short, CACCHIOTTI alleges breach by PHILLIPSs acts or omissions and that that breach caused the damages.

b. The burden of proof.

What CACCHIOTTI fails to provide in any pleading or at trial was the nature of the PHILLIPS act or omission which caused the breach. The concrete failed-that much is known. Why the concrete failed is an essential element necessary to prove and to put PHILLIPS on notice of what he did or did not do. Without the specifics even

alleged by CACCHIOTTI, PHILLIPS is left with no real way to formulate a defense as to an act or omission. The concrete could have failed for any number of reasons: bad batch, inadequate design, erosion through leaks in supply lines installed by PHILLIPS, leaks in other underground water supplies (mainline, landscaping) provided by other subcontractors or the municipality, inadequate compaction of base by PHILLIPS, design defect, leaking water from decorative rosettes (nozzles) provided by PHILLIPS.

"NIFM having the burden of proof, it was entitled to prevail on a given claim only if it established each essential element thereof. NIFM says it was asserting claims based on statute, contract and tort, Assuming that is correct, a violation of statute is actionable only if the statute imposes a duty, the duty is breached, and the breach was a proximate cause of damage to the claimant (Citations Omitted). A breach of contract is actionable only fi the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant (Citations Omitted). Negligence is actionable only if public policy imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant (Citations Omitted). It follows that NIFM had to establish duty, breach, causation and damage as to each of its claims. We turn first to duty. NIFM asserted before the Board and the superior court that DLI had a duty to administer the retrospective rating program in accordance with recognized insurance principles. It asserts now that DLI's duty was statutory by virtue of RCW 51.16.035; contractual by virtue of the contract formed in June or July 1985; and existed in tort by virtue of American Nursery Prod., Inc v. Indian wells Orchards, 115 Wash.2d 217, 230, 797 P.2d 477 (1990) ("Negligent performance of a contract may create a tort claim if a duty exists independently of the performance of the contract). We assume, without so holding, that NIFM is correct, and that NIFM established breach. We turn next to causation. ***To establish causation, NIFM had to show, among other things, that DLI's alleged breach (i.e., DLI's alleged mismanagement of claims) was a cause in fact of NIFM's alleged damages*** (Citations Omitted)(proximately cause

> includes cause in fact and legal cause). A cause in fact is a cause but for which the claimed damage would not have occurred (Citations Omitted)." (Emphasis added)

Northwest Independent Forest Manufacturers v. The Department of labor and Industries, 78 Wash.App 707, 713-714 (1995)

VI. CONCLUSION

CACCHIOTTI failed to demonstrate exactly what act or omission to act caused the breach.

The Findings of Fact and Conclusions of Law (CP 12-15) states:

> VI.
>
> Defendant did not Provide Plaintiff with a properly working water fountain.
>
> VII
>
> There is no evidence that any other person did anything to the fountain to cause the "funny pipe" to be pushed downward through the rosette, to which it is adhered, and through the concrete slab (6 inches), while still inside the pvc sleeve, causing the funny pipe to "kink", and shoot water downward under the slab.

(CP 14)

The only evidence presented was that PHILLIPS provided a properly working fountain and that upon a call regarding maintenance the fountain was found to have been tampered with by debris being placed on the fountain and washed into the catch basin. That thereafter for a period of twenty (20) days the fountain was operated without problems and there was no further contact between PHILLIPS and the project in question.

The evidence at trial was that upon PHILLIPS second maintenance call the concrete slab was found to be broken and dirt and debris were in the fountain along with bent tubing disconnected from a nozzle.

The only evidence at trial was that the funny pipe was bent downward through the rosette inside the sleeve. CACCHIOTTI never examined the pipe in

question nor offered any explanation as to the cause of the failure of the concrete. Had CACCHIOTTI offered in his pleading the basis for the failure in the concrete as proof at trial as to the failure then PHILLIPS would have a fair opportunity to examine and refute the evidence against him.

Findings of Fact are reviewed for substantial evidence, conclusions of law are reviewed "de Novo". Ranier View Court Homeowners Assn Inc v. Zeaker. 157 WN APP 710, 719, 328 P.3d 1217 (2010).

Dated: December 2, 2016

RIES & KENISON

Attorney for Appellant

SHANE L. KENISON, WSBA 19613
404 South Division
PO Drawer 610
Moses Lake, WA 98837
509-765-3493

FILED
2016
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

Superior Court of Washington
County of GRANT

CACCHIOTTI PROPERTIES, LLC, a Washington limited liability company, **Plaintiff,** **and** BRADLEY PHILLIPS and JANE DOE PHILLIPS, husband and wife, dba DESERT SUN LANDSCAPING, and DEVELOPERS SURETY AND INDEMNITY COMPANY, an Iowa Corporation. **Defendants.**	**Court of Appeals Case No 345491** **Grant County No. 13-2-01367-0** Affidavit of Service

State of Washington)
) ss.
County of Grant)

The undersigned, being first duly sworn on oath, deposed and says:

That she is a citizen of the United Stated of America and of the State of Washington and is over the age of eighteen (18) years and is not a party interested in the above-entitled action, and that she did on the 2nd day of December, 2016, hand deliver a copy of the following document to-wit:

1) **Brief of Appellant**

in the above entitled matter to the following interested parties:

Jeremy Huberdeau
821 E. Sharon Ave
Moses Lake, WA 98837

LAW OFFICES OF
RIES & KENISON
404 SOUTH DIVISION
PO DRAWER 610
MOSES LAKE, WA 98837
509-765-3493

By _____

SUBSCRIBED AND SWORN before me this 2nd day of December, 2016.

_____
Notary Public in and for the State of
Washington, residing at Moses Lake.
My Commission expires: 04·02·17

LAW OFFICES OF
RIES & KENISON
404 SOUTH DIVISION
PO DRAWER 610
MOSES LAKE, WA 98837
509-765-3493