

66424-7

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No. 66424-7

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION 1**

LARRY BRODERICK & TAMMY BRODERICK, husband and wife,

Appellants,

v.

THE PORT OF SEATTLE, municipal corporation

Respondent.

APPELLANTS' BRIEF

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Introduction

Mr. Broderick appeals the trial court's decision to dismiss his case against the Port of Seattle on summary judgment. The Port hired Mr. Broderick's employer, Northwest Asphalt, to lay down new asphalt over a section of the pier at Terminal 25. Mr. Broderick stepped on old, eroded cement which gave way under his foot, and he fell to the rocks below the pier. Had the old cement not given away under his foot, he would not have fallen off the pier. The Port had a duty to maintain or barricade the old, eroded cement at the edge of the pier.

Assignment of Error

The trial court erred in granting the Port of Seattle's motion for summary judgment. There are sufficient facts to support Mr. Broderick's claim that the Port owed him a duty of care under both a premises liability claim and a general negligence claim.

Statement of the Case

In 2008, the Port of Seattle hired Northwest Asphalt to lay down new asphalt over a section of the pier at Terminal 25. (Declaration of Mr. Schmidt, CP 119). An apron runs along the western edge of Terminal 25. (Dec. of Mr. Schmidt, CP 120). An apron is the water edge of the pier

where vessels berth and cargo is loaded and unloaded. (Dec. of Mr. Schmidt, CP 120). Years before the asphalt job, a section of the apron at Terminal 25 had been demolished. (Deposition of Mr. Dowd, CP 148-149) It was at this demolished section of Terminal 25 where Larry Broderick fell. (Deposition of Mr. Dowd, CP 148)

Northwest Asphalt used a paver to put the asphalt on the ground, followed closely by a roller which flattens down the asphalt. (Deposition of Mr. Rodriguez, CP 152-153). Larry Broderick and two other laborers were working in between the paver and the roller. (Dep. of Mr. Rodriguez, CP 152-153). They had to work quickly filling in holes and flattening bumps to make sure they kept ahead of the roller. (Deposition of Mr. Rodriguez, CP 152-153). The operator of the paver had made a turn and then backed up to dump some more asphalt and told Mr. Broderick to move. This is the last thing Mr. Broderick can recall before his fall. (Deposition of Mr. Broderick, CP 157-158).

When asked what kind of condition the concrete around the edge of the pier where Mr. Broderick fell was in, Port employee Steve Schmidt testified "The -- the edge was eroded, it's -- it's broken up, it's garbage." (Deposition of Mr. Schmidt, CP 164). The Port admits that Larry Broderick did not simply walk off the end of the pier; rather the eroded concrete he stepped on gave way underneath him:

Employee was standing with his back to the unprotected edge of previously demo'd apron, when a piece of approximately 12" X 8" of eroded asphalt gave way under foot. He lost his balance and fell backwards off the unprotected edge approximately 10-15" and landed on the rip-rap rock below with bent knees then fell forward onto his forehead – sustaining significant knee and minor head injuries.

(Port of Seattle's Post Incident Evaluation (emphasis added), prepared by John Hogan. Dep. of Mr. Hogan, CP 168-170; and exhibit 15 & 16 to Mr. Hogan's dep., CP 171-173 & CP 174-176)

Port employee Steven Schmidt prepared a special report regarding the incident in which he states: "The eroded asphalt paving underfoot gave way broke off. The workman lost his balance and toppled over edge." (Deposition of Mr. Schmidt, CP 160-162, and Exhibit 6 to Schmidt dep, CP 163). He testified that he could see where the asphalt broke off and that the "edge was eroded". (Deposition of Mr. Schmidt, CP 160).

Because the tide was out, Mr. Broderick fell onto rocks. Had the tide been in, he would have fallen into the water. (Deposition of Mr. Dowd, CP 150).

Northwest Asphalt employee Pedro Rodriguez testified that other workers were pointing to the edge just after Mr. Broderick fell and said that: "he [Broderick] got too close and the piece – the piece of old asphalt broke." (Deposition of Mr. Rodriguez, CP 154-155)

Argument

1. The Port breached its duty under the waterfront WACs to maintain the walking and working surfaces of its docks and terminals.

To support its motion for summary judgment, the Port claimed that Mr. Broderick's negligence claim fails because the Port did not owe him any duty to protect the edge of the pier where he fell. (CP 17). To support its proposition, the Port cited some of the WACs governing docks, piers and waterfront related activities. (CP 20). The Port is correct that guardrails are not usually required at docks. However, the waterfront WACs also state:

The structural integrity of docks, wharves, terminals and working surfaces shall be maintained. WAC 296-56-60117(1); (copy of WAC at CP 182)
and,

All walking and working surfaces in the terminal area shall be maintained in good repair. WAC 296-56-60117(4).
(copy of WAC at CP 182)

The Port violated its duty to maintain the working surface at the edge of the pier. When asked what kind of condition the concrete around the edge of the pier was in, Port employee Steve Schmidt testified "The -- the edge was eroded, it's -- it's broken up, it's garbage." (Deposition of Mr. Schmidt, CP 164). The Port's own Post Incident Evaluation described the sequence of events as follows:

Employee was standing with his back to the unprotected edge of previously demo'd apron, when a piece of approximately 12" X 8" of eroded asphalt gave way under foot. He lost his balance and fell backwards off the unprotected edge approximately 10-15" and landed on the rip-rap rock below with bent knees then fell forward onto his forehead – sustaining significant knee and minor head injuries.

(Port of Seattle's Post Incident Evaluation (emphasis added), prepared by John Hogan. Dep. of Mr. Hogan, CP 168-170; and exhibit 15 & 16 to Mr. Hogan's dep., CP 171-173 & CP 174-176)

Port employee John Burdick testified that he saw what looked to be where the piece of old asphalt broke loose and tried to capture that in his photographs. (Deposition of Mr. Burdick, CP 179).

The Port violated its duty under WAC 296-56-601117(1) and (4) to maintain the walking and working surfaces in the terminal area. The "eroded and broken up" cement at the edge of the pier gave way when Mr. Broderick stepped on it and he fell to the rocks below.

2. The Port breached its duty under the waterfront WACs to barricade surfaces in poor repair.

The Port also breached its duty to barricade the eroded and broken up cement. The waterfront WACs require the Port to barricade surfaces in poor repair such as the eroded and broken up cement at the edge of the pier:

Ditches, pits, excavations, and surfaces in poor repair shall be guarded by readily visible barricades, rails or other equally effective means.

WAC 296-56-60225 (*emphasis added*). (copy of WAC at CP 184)

The Port failed to guard the eroded and broken up cement with barricades. A second waterfront WAC also requires the Port to barricade weakened surfaces:

All large openings or weakened surfaces shall be barricaded on all exposed sides with barricades equipped with blinkers, flashing lights, or reflectors.

WAC 296-56-60117(6) (copy of WAC at CP 182).

Port employee John Burdick testified that there was no type of railing or barrier blocking the edge of the pier where Larry Broderick fell. (Deposition of Mr. Burdick, CP 178). Long before Northwest Asphalt came out to work at Terminal 25, the Port should have either repaired or barricaded the eroded cement at the edge of the pier.

3. The Port breached its duty under the waterfront WACs to have a bull rail at the water edge of its docks.

Even if the cement next to the edge of the pier was not eroded and broken up, the Port was still required to have bull rails at the edge of the pier. WAC 296-56-60123(a) states: "Vehicle curbs, bull rails, or other effective barriers at least six inches (15.24 cm) in height and six inches in width, shall be provided at the waterside edges of aprons and bulkheads,

except where vehicles are prohibited. Curbs or bull rails installed after January 1, 1985, shall be at least ten inches (22.9 cm) in height.” (copy of WAC at CP 206). Port employee Jerry Dowd testified that: “Generally, all our commercial piers will have what’s called a bull rail right on the water edge that’s 12-by-12 or something similar built out of concrete.” (Deposition of Mr. Dowd, CP 148). (He also testified that there is a bull rail on the apron at Terminal 25 north of where Larry Broderick fell, but that where he fell there was no bull rail. (Deposition of Mr. Dowd, CP 148-149, & 178). Had the Port installed a bull rail at the edge of the pier as required, Mr. Broderick would not have been able to step on the eroded concrete at the edge and would not have fallen to the rocks below. The Port breached its duty to place bull rails on the edge of the pier.

As evidenced by the violation of the waterfront WACs cited above, there is clearly sufficient evidence for a jury to find that the Port was negligent.

The owner of a premises owes to the servant of an independent contractor, employed to perform work on that owner’s premises, the duty to avoid endangering him by the owner’s own negligence. Winfrey v. Rocket Research, 58 Wn.App 722, 725, 794 P.2d 1300 (Div. I, 1990) (citing Lamborn v. Philips Pac. Chem. Co., 89 Wn.2d 701, 707 (1978) (in turn citing Epperly v. Seattle, 65 Wn.2d 777, 785 (1965); see also W. Prosser & W. Keeton, *Torts* Sec. 71 at 510 (5th ed 1984)).

4. The Port breached its duty to Mr. Broderick, a business invitee, to use reasonable care to discover the eroded asphalt.

The Port admits that Mr. Broderick was a business invitee. As such the Port is liable for harm caused by the eroded and broken up cement if it:

- a. Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- b. Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- c. Fails to exercise reasonable care to protect them against danger.

Kamla v. Space Needle Corp., 147 Wn.2d 114, 125-126, 52 P.3d 472 (2002) (*citing* Restatement Second of Torts Sec. 343.)

- a. The Port knew or by the exercise of reasonable care should have discovered the condition, and should have realized it involved an unreasonable risk of harm.

In our case, the Port knew the cement near the pier was in bad shape and should have realized that it involves an unreasonable risk of harm. At the very least this is a question for the jury. Port employee Steve Schmidt testified “The -- the edge was eroded, it's -- it's broken up, it's garbage.” (Deposition of Mr. Schmidt, CP 164) This condition had been in existence for years. (Deposition of Mr. Schmidt, CP 164-165; see also Deposition of Mr. Dowd, CP 148-149). Mr. Schmidt testified that he thought the Northwest Asphalt employee would be laying asphalt within

just 12 feet of the edge. (Deposition of Mr. Schmidt, CP 162). Mr. Schmidt testified that the Port knew of the hazard but chose to ignore it:

Q. And when were you first aware of the – the poor condition of the asphalt or concrete near the – near the edge where Mr. Broderick fell?

A. When they removed the containers.

Q. Okay. And was that prior to his actual fall?

A. Yes.

Q. Did you notify the tenant of the poor condition of the asphalt in that area?

A. No, I notified my engineer.

Q. Okay. And who was that?

A. Jerry Dowd.

Q. Okay. And what did—if anything, did Mr. Dowd tell you about that?

A. He said, We don't care. We're not doing anything there.

(Dep. of Mr. Schmidt, CP 166 (emphasis added)).

This satisfies Plaintiffs' requirement to show that the Port knew or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees. Kamla, 147 Wn.2d at 125-126

b. The Port should have expected that Northwest Asphalt employees would not discover or realize the danger, or would fail to protect themselves against it.

At the very least it is a jury question whether the Port should expect that the Northwest Asphalt workers would not discover or realize the danger posed by the unstable concrete. Port employee John Brudick

testified that he was not able to tell whether the asphalt where Mr. Broderick fell was in poor condition: "...it didn't look like it was in terrible condition, other than where – no, I can't give you a real accurate answer on that. I don't know what – what separates good condition from bad condition, generally speaking." (Dep. of Mr. Burdick, CP 179-180). Port employee Jerry Dowd was asked to describe the condition of the concrete along the edge of the pier where Larry Broderick fell and said: "It didn't look in terrifically good shape, but I've seen worse." (Dep. of Mr. Dowd, 146-147). If the Port's own employees did not realize the danger posed by the unstable concrete, even after the fact, then a jury should be allowed to find that Northwest Asphalt employees would not have discovered the danger. This satisfies Plaintiffs' requirement to show that the Port should expect that Mr. Broderick would not discover or realize the danger. Kamla, 147 Wn.2d at 125-126.

- c. The Port failed to exercise reasonable care to protect Northwest Asphalt employees against the danger posed by the eroded asphalt.

The Port does not claim that it exercised reasonable care to protect Mr. Broderick against the danger posed by the eroded cement at the edge of the pier. Port employee John Burdick testified that there was no type of railing or barrier blocking the edge of the pier where Larry Broderick fell.

(Dep. of Mr. Burdick, CP 178) Rather the Port claims that it had “no duty to protect Broderick from the known and obvious fall hazard at the edge of the pier where he fell.” (Motion for SJ, CP 21).

The Port claims that it did not need to exercise reasonable care to protect Mr. Broderick because the danger was open and obvious. It characterized the danger as merely the danger caused by walking of the edge of the pier. However, as show above, the Plaintiffs’ claim is that the eroded and broken up cement at the edge of the pier was a danger when it fell out from under his foot. This was not an open and obvious danger. At a minimum this is a question of fact for the jury.

Standard of Review

The standard of review was set forth in a clear and concise manner recently by Division I in Cornish College of the Arts v. 1000 Virginia Ltd., 242 P. 3d 1, ___ Wn. App. ___ (Div. I, 2010): “The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in connection with a summary judgment motion. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). In reviewing an order for summary judgment, we engage in the same inquiry at the trial court. Folsom, 135 Wash.2d at 663, 958 P.2d 301. Summary

judgment is properly granted where the pleadings, affidavits, depositions, and admissions on file demonstrate “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). A material fact “is a fact upon which the outcome of the litigation depends, in whole or in part.” Lamon v. McDonnell Douglas Corp., 91 Wash.2d 345, 349, 588 P.2d 1346 (1979) (quoting Morris v. McNicol, 83 Wash.2d 491, 494-95, 519 P.2d 7 (1974)). All evidence must be considered in the light most favorable to the nonmoving party, and summary judgment may be granted only where there is but one conclusion that could be reached by a reasonable person. Lamon, 91 Wash.2d at 349-50, 588 P.2d 1346 (quoting Morris, 83 Wash.2d at 494-95, 519 P.2d 7).”

It is anticipated that the Port of Seattle will allege that both Mr. Broderick and his employer were negligent. While a jury would be allowed to believe only the facts in the defendant’s favor and disregard all of the facts in Mr. Broderick’s favor, the trial court is not allowed to do so.

Conclusion

The trial court erred in granting the Port of Seattle’s motion for summary judgment. There are sufficient, material facts to support Mr.

Broderick's claim that the Port owed him a duty of care under both a premises liability claim and a general negligence claim.

Dated: February 24th, 2011

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