NO. 34552-8-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

Susan Sanders, a married woman, Appellant,

v.

Joel Anderson and Carol Anderson, husband and wife, and the marital community comprised thereof, Respondents.

BRIEF OF APPELLANT

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ORIGINAL

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A. Assignments of Error

ASSIGNMENTS OF ERROR

1. The trial court erred by denying Plaintiff's Motion for Summary Judgment on Liability heard in open court on August 26, 2005, when Defendant presented no evidence to dispute Plaintiff's evidence showing liability.
2. The trial court erred by granting Defendant's Motion for Summary Judgment heard in open court on January 27, 2006, when Plaintiff presented substantial evidence concerning liability thus creating an issue of material fact and supporting Plaintiff's case as a matter of law.
3. The trial court erred by denying Plaintiff's Motion for Reconsideration, signed and filed on February 15, 2006, when Defendant's Motion for Summary Judgment was granted despite the presence of an issue of material fact and the presence of all elements of a negligence cause of action.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court improperly denied Plaintiff's Motion for Summary Judgment when there was no evidence of an issue of material fact concerning the slippery condition of the subject floor. (Assignment of Error 1.)

2. Whether the trial court improperly granted Defendant's Motion for Summary Judgment when there was evidence of an issue of material fact concerning the slippery condition of the subject floor and there was a basis for Plaintiff's case as a matter of law. (Assignment of Error 2, 3.)

3. Whether the trial court improperly denied Plaintiff's Motion for Reconsideration when evidence of an issue of material fact was produced and plaintiff provided a basis for her case as a matter of law. (Assignment of Error 2, 3.)

B. Statement of the Case

I. PROCEDURAL HISTORY

Plaintiff Susan Sanders filed a complaint against Mr. and Mrs. Anderson in the Superior Court of Washington in Kitsap County on August 10, 2004. CP 1-5.

Discovery was made. Plaintiff brought a Motion for Summary Judgment on the issue of liability that was heard on August 26, 2005. CP 6-19. Plaintiff's Motion was denied. CP 161-162. Defendant brought a Motion for Summary Judgment on the issue of liability on January 27, 2006. CP 163-172. Defendant's Motion was granted. CP 328-329. Plaintiff filed a Motion for Reconsideration. CP 333-337. Plaintiff's Motion was denied. CP 352.

II. FACTUAL HISTORY

a. Background Information

On or about August 22, 2001, Ms. Susan Sanders arrived in Washington State to visit her brother, Joel Anderson and his

family. CP 20: Ex 1, 39:24 (CP 25) and 40:15-17 (CP 25); Ex 2, 8:10 (CP 40) and 25:25-26:11 (CP 51-52); Ex 3, 6:12 (CP 71). She came for her niece, Megan Anderson's, wedding. CP 20: Ex 2, 9:5-7 (CP 41). Ms. Sanders had never been to the Anderson home in Washington before the 2001 visit. CP 20: Ex 1, 40:6-7 (CP 25); Ex 2, 9:2-4 (CP 41).

In preparation for wedding guests who would be visiting their home, the Andersons replaced the door leading to the garage, among other things. CP 20: Ex 2, 12:4-13 (CP42). The door was replaced about one week prior to Ms. Sanders' arrival. CP 20: Ex 3, 16:24-17:3 (CP 79-80).

The Anderson home had tile flooring, which Ms. Anderson partially covered with throw rugs. CP 20: Ex 2, 20:14-23 (CP 46). The tile flooring had been in the Anderson home since they purchased it in 1984. CP 20: Ex 2, 17:20-25 (CP 44). Prior to the garage door replacement, a rug had not been placed in front of the guest bathroom, because the door would catch on the rug. CP 20: Ex 2, 22:7-12 (CP 48).

However, because the new door had greater clearance, Ms. Anderson was able to place a throw rug in that area. CP 20: Ex 2, 19:14-17 (CP 45). The throw rug she put there was the same type that she used throughout the house. CP 20: Ex 2, 19:22-24 (CP 45) and 20:2-3 & 14-23 (CP 46); Ex 3, 17:4-7 (CP 80). It was placed there so people entering through the garage door could wipe their feet. CP 20: Ex 2, 20:24-21:5 (CP 46-47). Though the rug was there for a short period of time, there was a lot of foot traffic over it. CP 95: Ex 4, 33:22-25 (CP 145). It was in the location of this throw rug, which had been moved momentarily, where Ms. Sanders fell. CP 20: Ex 2, 19:14-17 (CP 45). Prior to her fall, Ms. Sanders used this guest bathroom at least twice a day during her visit. CP 20: Ex 1, 47:14-16 (26) and 54:8-21 (CP 27).

Ms. Sanders generally doesn't wear shoes in houses. CP 20: Ex 1, 68:18-23 (CP 30). She walks around her house, as well as her daughter's house, which has tile floors, in stocking feet. CP 20: Ex 1, 68:14-18 (30) and 73:14-75:9 (CP 31). She

also walked around the Anderson house in her stocking feet. CP 20: Ex 1, 62:25-63:12 (CP 29). At no time did Carol Anderson warn Ms. Sanders to wear any type of footwear in the house. CP 20: Ex 2, 17:5-6 (CP 44). Ms. Anderson believes that people would feel comfortable walking around her home without shoes on. CP 20: Ex 2, 16:18-21 (CP 43).

Prior to the slip and fall on August 29, 2001, Ms. Sanders had no problem walking anywhere in the house. CP 20: Ex 1, 71:15-17 (CP 31). She had even entered the guest bathroom at least three other times in her stocking feet. CP 20: Ex 1, 62:25-63:12 (CP 29). Ms. Sanders saw no visible difference between the tiles under the throw rug and those not under the throw rug. CP 20: Ex 1, 72:21-73:13 (CP 31).

b. Notice of the Unreasonably Slippery Condition

A considerable period of time before 2001, and probably within a year of moving in, Joel Anderson slipped on the tile floor where a rug had been removed. CP 20: Ex 2, 23:20-24:3

(CP 49-50). Ms. Anderson had taken up the throw rug to wash it. CP 20: Ex 2, 21:23-25 (CP 46); Ex 3, 6:12-7:14 (CP 71-72). (On May 19, 2006, Plaintiff filed a Motion with this Court concerning slips in the Anderson home.)

From the time Mr. Anderson slipped, the Andersons realized that the rugs created a slippery condition; that the tiles under the throw rugs were more slippery than the surrounding tiles. CP 20: Ex 2, 21:25-22:1 (CP 47-48) and 24:15-17 (CP 50); Ex 3, 7:23-8:19 (CP 72-73) and 10:21-11:1 (CP 74-75). To prevent further slips, Ms. Anderson knew that she needed to be sure that nobody could walk on the floor when she swept under a throw rug. CP 20: Ex 2, 25:4-8 (CP 51) and 38: 4-12 (CP 60). Therefore, Ms. Anderson made a practice of removing rugs only when no one was home. CP 20: Ex 2, 22:2-5 (CP 48). She was also very careful to put the rugs back in the exact location they were prior to being picked up. CP 20: Ex 2, 22:4-5 (CP 48).

Though both Mr. and Mrs. Anderson knew that the tiles under the throw rugs were slippery, they did not warn their guests to avoid those areas if the rugs had been taken up. CP 20: Ex 2, 38:1-3 (CP 60); Ex 3, 11:2-3 (CP 75). Mrs. Anderson believes that if she had issued such a warning, Ms. Sanders' slip and fall would have been prevented. CP 20: Ex 2, 39:18-20 (CP 61). She also realizes that if she had blocked the walkway, the slip and fall would have been prevented. CP 20: Ex 2, 39:21-25 (CP 61).

Because she had not been warned of slippery conditions, and she had not slipped on the tile floors during her stay at the Anderson house, Ms. Sanders had no reason to suspect that any area of the tile floor would be slippery. CP 20: Ex 1, 73:14-74:22 (CP 31-32) and 77:4-7 (CP 32). Neither Mr. or Mrs. Anderson know of any reason for Ms. Sanders to know about or suspect the slippery condition of the tiles under the throw rugs. CP 20: Ex 2, 40:1-5 (CP 62); Ex 3, 11:4-7 (CP 75). Mr. Anderson believes that Ms. Sanders was using reasonable care

at the time she slipped and fell and sees no reason she should be held responsible for the fall. CP 20: Ex 3, 13:25-14:12 (CP 76-77).

c. The Incident

At the time of the fall, Mrs. Anderson was sweeping the kitchen and the hall outside the guest bathroom just inside the garage door. CP 20: Ex 2, 27:13-23 (CP 53). When Ms. Sanders entered the area, Mrs. Anderson was standing right outside the door to the hallway in front of the bathroom, sweeping. CP 20: Ex 2, 28:7-13 (CP 54). It was not unusual to see Mrs. Anderson sweeping. CP 20: Ex 1, 58:20-22 (CP 28); Ex 2, 28:7-23 (CP 54). Ms. Anderson had moved the throw rug to sweep the area under it. CP 20: Ex 1, 59:5 (CP 28); Ex 2, 29:1-4 (CP 55).

Mrs. Anderson was not aware of Ms. Sanders until after Ms. Sanders stepped around her. CP 20: Ex 2, 37:23-25 (CP 59). Ms. Sanders was wearing stockings on her feet at the time of her fall. CP 20: Ex 1, 61:25-62:3 (CP 28-29). Ms. Sanders

passed Ms. Anderson, stepped into the area where the throw rug had been, and fell - it was very quick. CP 20: Ex 1, 59:7-8 (CP 28); Ex 2, 30:4-8 (CP 56). Ms. Sanders' fall broke her right upper arm below the ball of the joint. CP 20: Ex 3, 15:3-16 (CP 78).

Sometime after Ms. Sanders fell, Ms. Anderson ran her foot across the tile under the throw rug and outside the throw rug and found a difference. CP 20: Ex 2, 34:20-23 (CP 57). The area under the rug was slick and the tiles not under the rug were not slick. CP 20: Ex 2, 36:4-13 (CP 58).

d. Evidence of the Unreasonably Slippery Condition

About twenty years ago, Mr. Anderson slipped, but caught himself, on the tile floor. CP 20: Ex 2, 23:20-24:11 (CP 49-50); Ex 3, 6:12-7:5 (CP 71-72). He slipped on tiles that had been covered with an area rug until just prior. CP 20; Ex 3, 7:6-

14 (CP 72). Mrs. Anderson had removed the rug to wash it. CP 20; Ex 2, 21:23-25. (CP 47).

Mrs. Anderson takes up the rugs when no one else is home. CP 20; Ex 2, 22:2-5 (CP 48). When Mrs. Anderson takes up the area rugs for cleaning, she is meticulous about ensuring that they are returned to their exact prior location. CP 20; Ex 2, 22:2-5 (CP 48). She goes so far as to count the tiles to guarantee proper placement. CP 20; Ex 2, 22:2-5 (CP 48).

In the days after the fall, Mrs. Anderson tested the tiles where Ms. Sanders slipped. In her opinion the tiles were slippery. CP 20; Ex 2, 36:4-10 (CP 58). Mr. Anderson also tested the tiles where Ms. Sanders slipped. CP 95; Ex 5, 12:3-5 (CP 152). In his opinion the tiles were slippery. CP 20; Ex 3, 13:15-21 (CP 76).

Both Mr. and Mrs. Anderson state that they knew the tiles under the area rugs were slippery. CP 20; Ex 2, 24:15-17 (CP 50); Ex 3, 10:21-11:1 (CP 74-75). They also state that the tiles that were not under the tile rugs were not slippery. CP 20;

Ex 2, 24:18-24 (CP 50) and 38:4-12 (CP 60); Ex 3, 8:12-19 (CP 73) and 17:22-25 (CP 80).

In October 2005, Defendant's expert, Mr. Topinka, tested the tile floor in the area where Ms. Sanders slipped. CP 230-231. Mr. Topinka's opinion is that the floor was properly slip resistant. CP 231. Mr. Topinka did not address the coefficient of friction necessary to be sufficiently slip resistant for people who are wearing stockings, as opposed to shoes. CP 230-231.

C. Argument

I. PURSUANT TO THE GENERAL RULE ON DECISIONS ON MOTIONS FOR SUMMARY JUDGMENT, THE TRIAL COURT SHOULD GRANT A MOTION FOR SUMMARY JUDGMENT WHEN THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW

a. Standard of Review

"When reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court." *Brown v. Stevens Pass, Inc.*, 97 Wn. App. 519, 522, 984 P.2d

448 (1999) quoting Reynolds *v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998).

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." *Id.* (quoting CR 56(c)). "The motion will be granted, after considering the evidence in the light most favorable to the nonmoving party, only if reasonable persons could reach but one conclusion. *Id,* emphasis added.

i. Material Fact And Matter Of Law

A material fact is one upon which the outcome of the litigation depends in whole or in part. Morris *v. McNicol,* 83 Wn.2d 491, 519 P.2d 7 (1974). A matter of law is one that must be met to sustain a lawsuit, such as establishing the elements of a claim or meeting the statute of limitations. Adams *v. Allen,* 56

Wn. App. 383, 783 P.2d 635 (1989); Parry *v. Windemere Real Estate/East, Inc.,* 102 Wn. App. 920, 10 P.3d 506 (2000).

A. Material Fact

A material fact is one upon which the outcome of the litigation depends in whole or in part. Morris *v. McNicol,* 83 Wn.2d 491, 519 P.2d 7 (1974). Though consumer expectations may be satisfied if an item is in conformity with codes or standards, the fact that the item is in compliance should not foreclose the plaintiffs' claims. Soproni *v. Polygon Apartment Partners*, 137 Wn.2d 319, 328, 971 P.2d 500 (1999); Falk *v. Keene Corporation,* 113 Wn.2d 645, 782 P.2d 974 (1989). Evidence of compliance with codes or standards is merely relevant evidence to be considered by the trier of fact. *Id.* "Fundamentally, it is for the trier of fact to determine" whether the subject item was unsafe "beyond that which would be expected by an ordinary consumer." *Id.*

B. **Matter Of Law**

As a matter of law, to prevail on a claim of negligence, Plaintiff must show: Defendants owed a duty to Plaintiff; they breached that duty; and Plaintiff was injured and sustained damages that were caused by the breach of duty.

Social guests are licensees. Younce *v. Ferguson,* 106 Wn.2d 658, 668-69, 724 P.2d 991 (1986). A landowner is liable for physical harm to licensees caused by a condition on the land if:

> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
> (b) he [or she] fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 133, 875 P.2d 621 (1994) (quoting Restatement (Second) of Torts sec. 342 (1965)).

In other words, a landowner has a duty to take precautions to protect licensees from an unreasonably dangerous condition to the same extent that he takes precautions for his safety, or to warn the licensee of the danger. *Tincani V. Inland Empire Zoological Soc'y,* 124 Wn.2d 121, 875 P.2d 621 (1994).

b. No Evidence to Show a Genuine Issue of Material Fact or that Plaintiff is not Entitled to a Judgment as a Matter of Law.

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." Brown *v. Stevens Pass, Inc.,* 97 Wn. App. 519, 522, 984 P.2d 448 (1999) quoting Reynolds *v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998) (quoting CR 56(c)). The non-moving party in Plaintiff's Motion for Summary Judgment was Defendant. As such, Defendants should be afforded the benefit of the evidence in their favor. At the time of Plaintiff's motion, the evidence concerning the slipperiness of the subject floor was the testimony of the Defendant's. Their testimony showed that they knew the subject floor was unreasonably slippery. Defendants did not present any evidence to the contrary. Because the evidence in the light most favorable to Defendants supported Plaintiff's assertion that the subject floor was unreasonably dangerous, Plaintiff's Motion for Summary Judgment should have been granted.

c. Evidence to Support Plaintiff's Position Which Creates an Issue of Material Fact and Provides the Bases for Plaintiff's Case as a Matter of Law.

The non-moving party in Defendant's Motion for Summary Judgment was Plaintiff. Plaintiff should be afforded the benefit of the opinion of the people who lived with the tiles for 17 years prior to the incident over Defendants' witness who "visited" the tiles once on an occasion fours years after the incident. Defendants have presented evidence that the tiles met the standard coefficient of friction to be "sufficiently slip resistant." Plaintiff presented evidence that the subject floor was unreasonably slippery at and before the time of the incident, and that the Defendants knew it. Because there is evidence to support both positions, an issue of material fact is present, which is properly decided by the trier of fact.

During the hearing on Defendants' Motion for Summary Judgment, there was discussion concerning the *Knopp v. Kemp & Herbert,* 193 Wn. 160, 164-65, 74 P.2d 924 (1938), decision, which states that "a fall, therefore, does not, of itself, tend to prove that the surface over which one is walking is dangerously unfit for the purpose." *Knopp*, at 164-65. Plaintiff does not claim that any one slip proves that the subject floor was dangerous. Plaintiff has put forth not only Defendant husband's prior slip as well as the subject slip, but also the testimony of Defendants that the tiles under the rugs were not safe to walk on CP 20; Ex 2, 38:4-12 (CP 60) and that they were considerably slipperier than the surrounding tiles. CP 20; Ex 3, 8:12-19 (CP 73). (On May 19, 2006, Plaintiff filed a Motion with this Court concerning slips in the Anderson home.)

There is an issue of material fact concerning whether the floor where Plaintiff slipped presented an

unreasonable risk of harm. Therefore, Summary Judgment in favor of Defendants cannot properly be granted.

D. Fees and Costs

Pursuant to RAP 18.1, Plaintiff/Appellant requests fees and costs for copies of the clerk's papers; preparation of this brief and any reply brief if filed (pursuant to RAP 14.3(b)); transmittal of the record on review; the filing fee; such other sums as provided by statute.

E. Conclusion

At the time of Plaintiff's Motion for Summary Judgement, August 2005, there was evidence to support only Plaintiff's allegation that the subject tiles were slippery (Defendant had no evidence to show that the floor was not slippery), summary judgment for Plaintiff should have been granted.

At the time Defendant's Motion for Summary Judgment was filed, five months later, there was evidence supporting both parties' assertions concerning whether the subject tiles were slippery on August 29, 2001, therefore summary judgment for Defendant should have been denied. Plaintiff's Motion for Reconsideration should also have been granted.

The trial court erred in the following decisions:

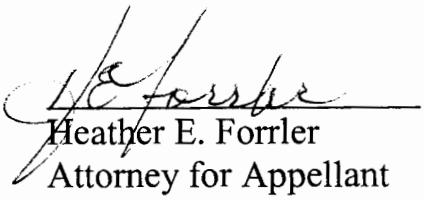
- Failing to grant Plaintiff's Motion for Summary Judgment in August 2005;
- Failing to deny Defendant's Motion for Summary Judgment in January 2006; and
- Failing to grant Plaintiff's Motion for Reconsideration concerning the decision on Defendant's Motion for Summary Judgment.

Therefore, the trial court's orders concerning Plaintiff's Motion for Summary Judgment and Motion for Reconsideration and Defendant's Motion for

Summary Judgment should be reversed and remanded. Plaintiff's Motion for Summary Judgment on Liability should be granted, and the case should be remanded to Superior Court for trial on the remaining issues.

Dated this 23rd day of May, 2006.

Respectfully submitted,



Heather E. Forrler
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I declare under penalty of perjury of the laws of the State of Washington that I caused to be mailed by US Postal Service, first class and faxed a copy of the following document to George Mix, attorney for Respondent on the 23rd day of May, 2006, at Silverdale, WA.

Patti Aycock

Patti Aycock

NO. 34552-8-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

Susan Sanders, Appellant, v. Joel Anderson and Carol Anderson, husband and wife, and the marital community comprised thereof, Respondents.	AFFIDAVIT OF MAILING

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

On May 23, 2006, I mailed a copy of the attached **BRIEF OF APPELLANT** with proper postage prepaid to Defendants' attorney, George Mix, whose name and address is as follows:

George Mix, WSBA # 32864
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ORIGINAL

Patti Aycock

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SUBSCRIBED AND SWORN to before me this 23rd day of May, 2006.

Teresa Ann Struyness

NOTARY PUBLIC in and for the
State of Washington
Residing at: Poulsbo
Commission Expires: 8/18/2007
Printed Name: Teresa Ann Struyness