

COURT OF APPEALS
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STATE OF WASHINGTON
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No. 42013-9- II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JULIE EASTMAN,
Respondent,

V.

PUGET SOUND BUILDERS NW, INC., a Washington corporation,

Petitioner,

And

COMMERCIAL INTERIORS, INC., a Washington corporation,
COCHRAN, INC., a Washington corporation, STAR DOG
FLOORING, INC., a Washington corporation, THE FLOOR GUYS,

Respondents,

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
HONORABLE BRYAN E. CHUSHCOFF
Pierce County Superior Court Cause No. 09-2-14951-3

Amended
COMMERCIAL INTERIORS, INC.'S APPELLATE BRIEF
Resp.

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ORIGINAL

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I. STATEMENT OF THE CASE

A. **At Argument, Puget Sound Builders conceded that someone knew of the missing plate**

In discussion with the Court on reconsideration, Mr. West conceded that based upon the pre-printed inspection forms by Macy's, someone must have known of the absence of the switch plate cover. RP (March 18, 2011), at 60 (lines 9-18).

B. **Evidence of Work performed by PSB representative Roger Redden**

Puget Sound Builders asserts that removal of existing carpets and outlet covers was only accomplished by subcontractors Floor Guys or Star Dog. This is contrary to the evidentiary finding of the lower court.

Judge Chushcoff, in an exchange with Mr. West, Counsel for PSB, during the hearing on PSB's Motion for Reconsideration stated:

THE COURT: There is some evidence that your folks were involved in pulling some plates.

RP (March 18, 2011) at 71 (lines 10-11).

During his deposition, Roger Redden alleged that performing demolition was not within the purview of PSB's job duties. CP at 142. He claimed that demolition would involve the removal of outlet covers. CP at 143-144.

However, Roger Redden, PSB's night supervisor submitted time cards billing for "DEMO FOR CARPET", the very week that

the incident took place. CP at 138, RP (February 25, 2010) at 20 (1-7), and 21 (9-14).

C. Facts regarding Ability to Supervise, Inspect work, and correct conditions.

Puget Sound Builders admits that Roger Redden was responsible for performing walk through inspections with Macy's for the work. CP at 142.

No one disputes the testimony of Shelley Louderback that had anyone discovered the defect in the carpet, it would have been called to the attention of Puget Sound Builders for correction. Shelley Louderback testified that the "depression" or "indentation" was a tripping hazard and should have been called out to be corrected. RP at 160 (Louderback Dep., pp. 44-45:22-7). Shelley Louderback testified that she notified Puget Sound Builders of the need to correct the missing switch plate cover, after Julie Eastman fell. CP at 158.

No one disputes that missing floor outlet covers was a condition specifically called out to be inspected for, according to pre-printed inspection forms. CP 155. According to Shelley Louderback, Macy's expected Puget Sound Builders to inspect for the absence of floor outlet covers. CP at 158.

Brett Carr, of Puget Sound Builders admits that in the course of working with Macy's if a condition were "not up to par" Macy's

would notify Puget Sound Builders for correction. RP at 164 (Carr Deposition, p. 44-45:24-7).

II. ARGUMENT

A. **Exclusivity is not required in order to find that an entity has control such that the entity is a “possessor of land”.**

Pursuant to Restatement (Second) of Torts § 328E, a

“possessor of the land” is:

- (a) a person who is in occupation of the land with intent to control it or
- (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
- (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Restatement (Second) of Torts § 328E(B) (1965), *Strong v. Seattle Stevedore, Co.*, 1 Wn. App. 989, 466 P.2d 545 (1970).

Based on the plain language of the restatement, more than one entity may be a “possessor of land”. Nowhere in the Restatement is the modifying term “exclusive” used.

B. **Contractual Duties Evidence Control over the Land, supporting a finding that an entity is a Possessor**

Contractual duties to maintain the premises are evidence of control, sufficient to uphold a finding that a party is a possessor. A possessor of property is one who maintains control over the property even though not the landowner. *Jarr v. Seeco Const. Co.*, 35 Wn.App. 324, 666 P.2d 392 (1983). In *Jarr*, the Court discussed

cases where a party was under a contractual duty to maintain the premises.

The possessor need not be the owner of the land, but could be a real estate agent who meets the definition of “possessor” set out in *Strong*. See, e.g., *Coughlin v. Harland L. Weaver, Inc.*, 103 Cal.App.2d 602, 230 P.2d 141 (1951) (owner's real estate agent was “possessor” of dwelling house it had contracted to sell for owner); *but see Christopher v. McGuire*, 179 Or. 116, 169 P.2d 879 (1946) (real estate broker employed to sell property is not in “possession and control” of property, unless broker was managing agent with contractual duty to owner to keep the premises in repair).

Jarr v. Seeco Const. Co., 35 Wn.App. 324, 327-328, 666 P.2d 392 (1983).

In finding that a real estate broker showing an unfinished condominium unit was a possessor, the Court relied upon an admission and stated, as follows:

. . . Terrace Realty was in control of the site and buildings as they related to the showing of certain units. This allegation is sufficient to create a factual issue as to Terrace's status as a possessor of the land under §§ 328E and 383 of the Restatement (2d) of Torts for purposes of liability under § 383.

Jarr at 329.

Here, in discussion with the Court on reconsideration, Mr. West conceded that based upon the pre-printed inspection forms by Macy's, someone must have known of the absence of the switch plate cover. RP (March 18, 2011), at 60 (lines 9-18).

Additionally, Washington Courts make no distinction between a possessor and a contractor who creates a condition “while the work is in his charge”.

One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

Williamson v. Allied Group, Inc., 117 Wn.App. 451, 456-457, 72 P.3d 230 (2003) (citing Restatement (Second) of Torts § 384 (1965)).

The phrase “while the work is in his charge” does not limit the contractor's liability spatially to the specific site under the contractor's direct physical control. Rather, it limits the contractor's liability temporally to harm occurring while the contractor is engaged in its work. *Williamson v. Allied Group, Inc.*, 117 Wn.App. 451, 456-457, 72 P.3d 230 (2003) (citing *Staub v. Toy Factory, Inc.*, 749 A.2d 522, 534 (Pa.Super.2000) (citing Restatement (Second) of Torts § 385 (1965))).

Here, Judge Bryan Chushcoff found that PSB stood in the same shoes as Macy's did under the circumstances. RP (February 25, 2010) at 40-41(14-2), and 41-42 (17-21).

Under the terms of the contract, PSB was responsible for correcting defective work during the entirety of the project, not just until Pad 15 was completed.

He shall erect and properly maintain at all times, as required by the conditions and progress of the Work, all necessary safeguards as required by the conditions and progress of the Work, all necessary safeguards for the protection of workers and the public, and . . .

CP at 135, Lump sum Contract Paragraph 15(b).

Pursuant to the terms of the contract, PSB had duties of inspection, maintenance, and warning of the conditions on the property caused by the work. CP 67, 75, and 134-136. Puget Sound Builders had control over “all safety precautions” and “all changes in the Work which Owner may order . . .” CP at 134-136, Paragraphs 15(a) and 31(d).

Puget Sound Builders argues that because Macy’s was open at the time of the incident, Macy’s, not Puget Sound Builders, was the “possessor of the land”. That misstates that PSB had the right and obligation to step in and correct any defective condition related to the work that was discovered during the entirety of the project phase.

It bears noting that PSB attempts to insert terms and conditions not contained within the contract, in an attempt to limit its “control” and liability as a possessor. Here, PSB did not identify a finite and compartmentalized parcel within the Macy’s premises, which would thereafter relieve it of its ability to control the premises. PSB did not contract for separate liability as to “Pad 15”. The floor

area was turned over to PSB on a nightly basis, for work on the pads. CP at 160. PSB remained free to make schedules for work to be performed in areas. CP at 45 (Carr Deposition, pp. 12-13:17-2, p. 14:1-8); CP at 160. Allowing PSB to now argue that it had completed its scope of work as to the “land” is not supported by the contract, conduct of the parties, or method of performance of the contract in this case. In fact, it is tantamount to inserting a contractual term that the parties themselves did not bargain for.

Here, Shelley Louderback admits that pursuant to the contract, any discovered defective condition would have been brought to the attention of Puget Sound Builders for correction. RP at 160 (Louderback Dep., pp. 44-45:22-7). Shelley Louderback testified that she personally notified Puget Sound Builders of the absence of a switch plate cover, and the need to correct the condition of the missing switch plate cover. CP at 158.

Here, under the facts present, PSB is entitled to “immediate occupation” to correct any such discovered and defective condition, and is a possessor under subsection (c) of Restatement (Second) of Torts § 328E (1965).

C. The Trial Court considered Restatement § 385, providing a basis for the denial of summary judgment, even if PSB is not a “possessor”.

This Court has authority to review all theories argued before the trial court, provided they are supported by the evidence and the

pleadings. *Singleton v. Jackson*, 85 Wn.App. 835, 843, 935 P.2d 644 (1997) (citing, *Tropiano v. City of Tacoma*, 105 Wn.2d 873, 876, 718 P.2d 801 (1986)).

Restatement § 385 states:

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.

Restatement 385, Persons Creating Artificial Conditions on Land on Behalf of Possessor: Physical Harm Caused After Work has been Accepted.

Under Restatement (Second) of Torts § 385, 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. *Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn.2d 413, 417, 150 P.3d 545 (2007).

Here, at oral argument the court engaged in a query with defense counsel Adam Cox regarding whether the fact that the jobsite had been “turned over” removed PSB’s liability.

(By Adam Cox): This contract creates a continuing obligation during the course of the entire work at Macy’s to make the premises safe. Just because Macy’s opens up its doors from 8:00 a.m. to 6:00 p.m. does not make it a nonwork-site

environment. It is still -- it is still being under construction. This is a rotating scope of work. One pad is being worked on, but they still have a duty to make sure that area is properly secured and --

THE COURT: What if Macy's had accepted all of the work on this contract and the whole thing was over as far as Macy's was concerned and it was the very next day?

MR. COX: I suppose then we would get into an issue of whether or not you had, basically, completion and acceptance doctrine, which is no longer viable under Washington law, but regardless, there's a recent November 22nd, 2010 opinion. I can't cite the name to you. That says, if a contractor walks away from a job site, even under the completion and acceptance doctrine, and should have a reasonable expectation that their work might cause a risk of harm and that cause of harm is foreseeable, they are still liable.

THE COURT: Right. You are trying to make a claim that under the contract, because the work was still going on, even though it wasn't going on here anymore, that, therefore, they are responsible for anything that sort of happens during the construction period. I'm just wondering, if the construction was over because they've accepted it and it was the very next day, would that make a difference? Are you telling me that it wouldn't?

MR. COX: I don't think that this construction was over. There is actually --

THE COURT: No. I understand that there is this argument that -- the claim is that you were still ongoing.

RP (February 25, 2011) at 16-17 (lines 10-21).

On November 22, 2010, Division One decided the case of *Jackson v. City of Seattle*, 158 Wn.App. 647, 244 P.3d 425 (2010). In that case, the court applied Restatement Section 385 to defeat two (2) contractors' claims that they had no tort liability once the project had been turned over and accepted. The court found that there were genuine issues of material fact regarding the breach of duty.

A factor supporting liability in this case, is that PSB had not completed the entirety of the work, but was still actively performing work at Macy's pursuant to the terms of its contract.

Here, even if Puget Sound Builders was not a "possessor", there was an adequate basis for Judge Bryan Chushcoff's denial of PSB's motion for summary judgment where, as discussed below, there is evidence that Puget Sound Builders, actually removed covers, contrary to its' claim that it only maintained supervisory duties.

D. There is Evidence that PSB actually Created the Condition.

Puget Sound Builders alleges it had only supervisory capacity on the jobsite, which is a disputed issue of material fact. There is evidence that PSB actually participated in the demolition work, which would have created or exposed the condition of the missing plates.

For purposes of summary judgment, PSB disputed that any of its workers participated in carpet removal or demolition work, the phase at which outlet covers would have been removed. CP 13 (6-8). Roger Redden, for PSB, testified that during the carpet demolition process, the outlet covers are removed and placed in a bag or box. CP at 143-144, p 20:1-4; p..23:2-18; pp. 71-72:4-16.

However, Roger Redden, PSB's night supervisor submitted time cards billing for "DEMO FOR CARPET", the very week that the

incident took place. CP at 138, RP (February 25, 2010) at 20 (1-7), and 21 (9-14).

Judge Chushcoff, in an exchange with Mr. West, Counsel for PSB, during the hearing on PSB's Motion for Reconsideration stated:

THE COURT: There is some evidence that your folks were involved in pulling some plates.

RP (March 18, 2011) at 71 (lines 10-11).

A genuine issue of disputed material fact exists as to whether PSB limited itself to only supervisory duties, where Roger Redden billed his employer Puget Sound Builders, for "demolition" work, which he admitted he would not engage in unless directed by his employer, Puget Sound Builders. The jury should properly be allowed to determine whether Puget Sound Builders caused and contributed to the absence of a cover plate.

III. CONCLUSION

Puget Sound Builders' conclusions that there is obvious error merely overlooks the analysis of Judge Chushcoff. Additionally, PSB asks this court to find as a matter of law that no reasonable juror could find that PSB was a possessor, despite the ongoing nature of PSB's general contracting work, its contractual obligations, its independent tort duties, and the known foreseeable

risk of harm of tripping or falling hazards posed by missing outlet covers.

DATED this 12th ^{October} day of ~~September~~, 2011.

LAW OFFICES OF KELLEY J. SWEENEY



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of October, 2011, I sent for delivery a true and correct copy of the foregoing **COMMERCIAL INTERIORS, INC.'S APPELLATE BRIEF** by the method indicated below, and addressed to the following:

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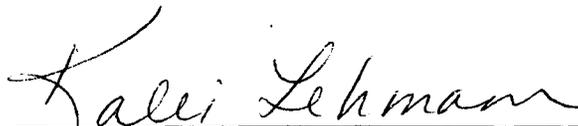
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