IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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.	No. 41801-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Jon Hopkins slipped and fell on a small patch of ice in Interstate Distributor Co.'s ("Interstate") parking lot after applying for a trucking job with Interstate. Hopkins fractured his right ankle and sustained other physical injuries. He brought a negligence suit against Interstate and the contractors, Rushforth Construction Co. Inc. and Tucci & Sons, Inc. ("Rushforth/Tucci"), who built and paved the parking lot. Rushforth/Tucci successfully moved for summary judgment at trial arguing, inter alia, that any dangerous conditions in the parking lot were the result not of their own work but of the defective project design of the civil engineering firm hired by Interstate to design the parking lot. Hopkins appeals, arguing that the trial court erred in relying on the abandoned "completion and acceptance" doctrine and ignoring

Washington's adoption of the *Restatement (Second) of Torts* § 385 (1965). Because Hopkins failed to establish any evidence tending to show that Rushforth/Tucci's work was the proximate cause of his injury, we affirm.

FACTS

On the morning of February 24, 2006, Hopkins went to Interstate to apply for a job as a truck driver. After leaving Interstate and entering its parking lot, Hopkins slipped and fell on a small patch of ice that had settled into a depression in the pavement, known in industry parlance as a "bird bath." Clerk's Papers (CP) at 39. Hopkins fractured his right ankle and sustained other physical injuries. Hopkins avers that because of the fall, he is permanently disabled and can no longer work as a truck driver.

Hopkins brought a negligence suit against Interstate and the contractors Rushforth/Tucci, who respectively built and paved the parking lot. Hopkins alleged that Rushforth/Tucci was negligent in the paving of the parking lot and this negligence was the proximate cause of his injuries.

Interstate and Rushforth/Tucci both moved for summary judgment. In opposition, Hopkins submitted a report produced by Mark Nordstrom, a civil engineer. Nordstrom concluded that the "bird bath" had "on a more probable than not basis, existed since the time the asphalt was installed." CP at 39. He also noted that

> 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 and otherwise acceptable variations in the finished pavement surface.

CP at 39. *See also* CP at 46 (providing guidelines from the Washington Asphalt Pavers Association describing a two percent minimum slope as necessary to prevent pooling of water during wet weather).

At the summary judgment hearing, the trial court concluded that

> [i]t appears to me if there was a problem with this, it's design. And, again, the way I'm reading Nordstrom's report is that some variations are to be expected, normal and otherwise acceptable variations. This, unfortunately, is one of them. Had it been more of a grade, it wouldn't have been a factor, but that's a design feature.

Report of Proceedings (RP) at 17. Because Rushforth/Tucci was not responsible for the parking lot's design,[1] the trial court granted its motion for summary judgment. Hopkins timely appeals.[2]

ANALYSIS

Hopkins alleges that Rushforth/Tucci's negligent paving was the proximate cause of his injury. Because Hopkins failed to present proof tending to establish that Rushforth/Tucci created a dangerous condition while paving the parking lot and, instead, the design of the parking lot itself created the dangerous condition, we affirm the trial court's summary judgment.

We review summary judgments de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of

[1] Interstate hired a civil engineering firm to design the parking lot. The firm, David Evans & Associates, is not a party to this dispute.

[2] The trial court did not award summary judgment to Interstate. Interstate and Hopkins have settled their differences out of court, entering a signed stipulation and agreed order of dismissal with prejudice in February 2011. Interstate has submitted a brief on behalf of Hopkins in the present appeal but because Interstate is no longer an aggrieved party to this action, we do not consider it. RAP 3.1.

material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *See LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (footnote omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

To establish a prima facie case for negligence against Rushforth/Tucci, Hopkins had to show (1) the existence of a duty owed to him,[3] (2) a breach of that duty by Rushforth/Tucci, (3) a resulting injury, and (4) that the claimed breach was the proximate cause of the injury. *Degel v.*

[3] The majority of Hopkins's brief focuses on whether Rushforth/Tucci owed him a duty. He argues that *Davis v. Baugh Industrial Contractor's Inc.*, 159 Wn.2d 413, 417, 150 P.3d 545 (2007), rejected the "completion and acceptance doctrine" whereby a contractor was not liable for injuries to third parties—even if their work was negligently performed—after an owner has accepted the work. Hopkins is correct in his reading of *Davis* and, further, in asserting that Washington has adopted § 385 of the *Restatement (Second) of Torts* and, accordingly, "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*, 159 Wn.2d at 417. Nevertheless, Hopkins fails to explain adequately why this court should focus *exclusively* on the duty element of his claim (an element conceded by Rushforth/Tucci) when the dispositive issue reached by the trial court involved a lack of evidence supporting a proximate causation finding.

Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Proximate cause is generally a factual question, however if reasonable minds could not differ, these factual questions may be determined as a matter of law. *Sherman v. State*, 128 Wn.2d 164, 183-84, 905 P.2d 355 (1995). Proximate cause has two prongs: "cause in fact" and legal causation. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 282, 979 P.2d 400 (1999). Cause in fact relates to "but for" causation; "but for" the defendant's breach of duty the plaintiff would not have been injured. *Hertog, ex rel. S.A.H.*, 138 Wn.2d at 282-83. "Legal causation 'rests on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend.'" *Hertog, ex rel. S.A.H.*, 138 Wn.2d at 283 (quoting *Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243 (1992)).

Here, Hopkins argued to the trial court that Rushforth/Tucci created a dangerous condition in the Interstate parking lot in the course of their paving work and, but for that condition, he would not have been injured. In support of this contention, Hopkins submitted Nordstrom's study stating, in part, that the "observed [dangerous] condition indicates that the depression was formed at the time of paving, and has been present the entire time the pavement has been in service." CP at 39. But as Rushforth/Tucci point out, Nordstrom's study also indicates that the *design plans* specify numerous finished slopes at one percent—below the industry minimum of two percent. Nordstrom concludes his report by stating, "The design pavement slopes are below recommended industry minimums. Such grades are . . . generally prone to isolated areas of ponding and pooling." CP at 46. The trial court correctly interpreted the report to mean there was a problem with the design of the parking lot and not the construction. Rushforth/Tucci built the parking lot according to the design specifications

submitted to it by a civil engineering firm hired by Interstate. Rushforth/Tucci were not responsible for the design and, as such, are not responsible for the allegedly dangerous conditions resulting from the badly designed parking lot. Hopkins fails to establish evidence tending to show that Rushforth/Tucci's paving work on Interstate's parking lot was the proximate cause of his injury. Accordingly, we find that his tort claim against Rushforth/Tucci necessarily fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

JOHANSON, A.C.J.