IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JULIE EASTMAN Respondent, v. PUGET SOUND BUILDERS NW., INC., A Washington corporation, Appellant, And COMMERCIAL INTERIORS, INC., a Washington corporation; COCHRAN, INC., a Washington corporation; and THE FLOOR GUYS, Respondents.	No. 42013-9-II UNPUBLISHED OPINION

Armstrong, P.J. — Puget Sound Builders NW Inc. appeals the denial of their motion for summary judgment in a negligence action. Julie Eastman, a Macy's employee, fell because of a depression in the floor caused by new carpet laid over an uncovered outlet. Eastman sued Puget Sound Builders, the general contractor, and various subcontractors. Puget Sound Builders moved for summary judgment arguing that the flooring company was an independent contractor and Puget Sound Builders did not proximately cause Eastman's injury. The trial court denied summary judgment and Puget Sound Builders successfully sought discretionary review. Because other theories of duty have not been litigated below, including Puget Sound Builders' possible duty arising from its contract with Macy's and its own supervisory conduct, we dismiss this

interlocutory appeal as improvidently granted and remand to the trial court for further proceedings.

FACTS

On November 18, 2006, Eastman fell because of a depression in the floor caused from new carpet laid over an uncovered electrical outlet. Eastman was a Macy's employee at the time. She allegedly sustained serious injuries.

Before Eastman's injury, Macy's entered into an agreement with Puget Sound Builders to remodel the Puyallup Macy's store at the South Hill Mall. Puget Sound Builders hired Commercial Interiors Inc., a subcontractor, to remove and replace the carpeting. Commercial subcontracted the carpet installation to various companies, including Star Dog Flooring Inc. and The Flooring Guys.

The Macy's contract explained Puget Sound Builders' responsibility for safety as the general contractor and added that Puget Sound Builders "is as fully responsible to the Owner for the acts and omissions of his Subcontractors and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him." CP at 136.

Puget Sound Builders employed Roger Redden to supervise the night work, including carpet replacement. Puget Sound Builders scheduled the carpet replacement, and then, before the store opened in the morning, Redden and Macy's store manager, Shelley Louderback, inspected the night's work to ensure that the carpet was safe for the public. Louderback testified that the depression in the carpet was the type of condition that she and Puget Sound Builders looked for during their inspections. After Eastman fell, Louderback observed an indentation in the carpet of

about two inches. Christopher Fergelic, the store's maintenance technician, also noticed a small concave spot or divot in the carpet and installed a brass electrical outlet cover to fix the indentation.

Redden testified that he did not do carpet demolition, that installing the carpet might involve removing outlet covers; and that the carpet installers were responsible for removing and replacing the covers. But Redden submitted a time card for the week of November 18, 2006, for 10 hours of "demo for carpet" and 20 hours of "carpet" work. CP at 138. Brett Carr, the vice president of Puget Sound Builders, declared that as a general contractor, his company did not supervise the actual work done by carpeting company employees; nor did Puget Sound Builders provide such employees tools for the work.

Puget Sound Builders moved for summary judgment, arguing that: (1) it "cannot be vicariously liable for the negligent acts of an independent contractor" and (2) "[i]t is also clear that any reasonable inspection could not have uncovered the alleged defective workmanship of the carpet layer under these circumstances." CP at 11-22. The trial court denied summary judgment, ruling, "I'm persuaded by Mr. Cox'[s] argument about premises liability here, and that effectively your client stood in the shoes of that . . . you stood in the shoes for purposes of tort liability." Report of Proceedings (RP) at 42. Puget Sound Builders sought discretionary review, which our court commissioner granted to address "the legal question of what duty, if any, PSB [Puget Sound Builders] owed to Eastman." Commissioner's Ruling Granting Review at 5-6.

ANALYSIS

I. Standard of Review

To demonstrate negligence, Eastman must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury. *Jackson v. City of Seattle*, 158 Wn. App. 647, 651, 244 P.3d 425 (2010). The only element at issue here is whether Puget Sound Builders owed a duty to Eastman.

Parties generally may not appeal a denial of a motion for summary judgment. RAP 2.2(a); *Tapps Brewing, Inc. v. City of Sumner*, 106 Wn. App. 79, 82, 22 P.3d 280 (2001). But an appellate court may grant discretionary review if "[t]he superior court has committed an obvious error which would render further proceedings useless." RAP 2.3(b)(1).

II. Duty

Puget Sound Builders moved for summary judgment on two legal theories: (1) the flooring company worked as an independent contractor and (2) Puget Sound Builders did not breach a duty of care owed to Eastman. Puget Sound Builders argues on appeal that it did not owe Eastman a duty because it did not possess the premises or proximately cause Eastman's injury. Commercial responds that the Macy's contract gave rise to Puget Sound Builders' duty to inspect, maintain, and warn of conditions on the property the work caused. Eastman also contends that there are material factual questions about whether Puget Sound Builders owed her a duty based on evidence that Puget Sound Builders assumed a responsibility to maintain and supervise all safety precautions and programs during the remodeling process.[1] We now dismiss

[1] Eastman also relies in part on *Restatement (Second) of Torts* §§§ 343, 426, and 429. We decline to reach these additional arguments as they have not been properly litigated.

this appeal under RAP 2.3(b).

The parties have argued multiple legal theories to demonstrate that Puget Sound Builders owed Eastman a duty, including that Puget Sound Builders' duty to Eastman arises from the Macy's contract and Puget Sound Builders' conduct.

A contract can create a nondelegable duty of care. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 333-34, 582 P.2d 500 (1978). And a contractual duty can extend beyond the parties to the contract. *Kelley*, 90 Wn.2d at 334 ("an affirmative duty assumed by the contract may create a liability to persons not party to the contract, where failure to properly perform the duty results in injury to them").

The contract at issue in this case states that Puget Sound Builders:

> shall be solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall provide sufficient, safe and proper facilities and safeguards at all times for the prosecution of the Work and the inspection of the Work by the Owner and *for the protection of the public from injury*. . .[The Contractor] 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 he shall designate a responsible member of his organization on the Work whose duty shall be the prevention of accidents.

CP at 134-35 (emphasis added). The contract also states that Puget Sound Builders

> is as fully responsible to the Owner for the acts and omissions of his Subcontractors and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.

CP at 136. This contractual language could be construed to create duties on behalf of Puget Sound Builders to inspect the carpet and floor covering or otherwise ensure that the work was completed safely; it could also be construed to make Puget Sound Builders liable for the "acts and

omissions" of the carpet layers, all for the protection of the public and other workers. CP at 26-27, 134-36. But because no party moved for summary judgment on contractual duty grounds, the issue of Puget Sound Builders' possible contractual duty has not been litigated.

Moreover, the record shows that Puget Sound Builders inspected the project, which may have given rise to a duty to the public. Before the store opened in the morning, Redden inspected the work from the night before along with the Macy's store manager, to ensure that the carpet pad was safe for the public. Louderback testified that the depression in the carpet was the type of condition that she and Puget Sound Builders looked for during their carpet inspections. And Redden submitted a time card for the week of November 18, 2006, for 10 hours of "demo for carpet" and 20 hours of "carpet" work. CP at 138.

Puget Sound Builders would be liable for its own negligence that injures another. *Lewis v. Scott*, 54 Wn.2d 851, 858-59, 341 P.2d 488 (1959). Although Puget Sound Builders argued below that the indentation was not apparent and that no reasonable inspection would have discovered it, we did not grant review on breach of duty. Thus, we do not address whether Puget Sound Builders breached any duty to inspect the completed carpet installation.

In conclusion, because the record discloses that Puget Sound Builders could owe Eastman a duty on grounds not litigated below, we will not address the sole duty issue raised in the motion for summary judgment: whether the subcontractor carpet layers were independent contractors for whose work Puget Sound Builders is not liable. Even if we were to hold that the carpet layers were independent contractors, the decision would not render "further proceedings useless." RAP 2.3(b)(1). We dismiss Puget Sound Builders' interlocutory appeal as improvidently granted and

remand to the superior court for further proceedings.

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.

Armstrong, P.J.

We concur:

Hunt, J.

Penoyar, J.