IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LARRY BRODERICK and TAMMY BRODERICK, husband and wife,	)	NO. 66424-7-I
	)	DIVISION ONE
Appellants,	)	
v.	)	
	)	
THE PORT OF SEATTLE, a municipal corporation,	)	UNPUBLISHED OPINION
	)	FILED: December 19, 2011
Respondent.	)	

Lau — This case involves an independent contractor's employee who fell off a pier owned by the Port of Seattle. Larry Broderick sued the Port for damages, claiming general negligence and premises liability. Because the Port owed Broderick no duty of ordinary care, no statutory duty, and no duty as a business invitee, we affirm the trial court's summary judgment order dismissing Broderick's claims.

FACTS

The facts—viewed in the light most favorable to Broderick as the nonmoving party—are as follows: In July 2008, the Port contracted with Northwest Asphalt to perform asphalting work at Terminal 25, a marine cargo terminal in Seattle. The

contract between the Port and Northwest Asphalt provided:

> The Contractor shall supervise and direct the Work using its best efforts, skills and attention. The Contractor shall be solely responsible for, and shall have full control and charge of construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract, including the work of Subcontractors, Suppliers, and all other persons performing a portion of the work. The Contractor is for all purposes an independent contractor and not an agent or employee of the Port.

The contract also provided:

> The Contractor assumes full responsibility for and shall comply with all safety laws, regulations, ordinances and governmental orders with respect to the performance of this Contract. . . .
>
> The Contractor shall have the sole responsibility for the safety, efficiency and adequacy of the Contractor's plant, appliances and methods, and for any damage or injury resulting from their failure, or improper maintenance, use, or operation. The Contractor shall be solely and completely responsible for the conditions of the Project Site, including safety of all persons and property in performance of the Work.

In his declaration, Steve Schmidt, the Port's Seattle senior construction inspector, testified, "Northwest Asphalt was fully and exclusively responsible for the safety of its employees, the conditions of the work site, and for the safe performance of its work."

Terminal 25 is used for the loading, unloading, handling, and storage of marine cargo to and from ships. Its western edge consists of an "apron" where vessels berth and cargo is loaded, unloaded, and handled. According to Tom Berg, senior manager for marine maintenance for the Port, Terminal 25 does not have handrails or guardrails on its waterside edge "because they would interfere with its purpose (access to vessels and loading and unloading of cargo)."

Schmidt met with Northwest Asphalt's job superintendent, Rex Allen, before Northwest Asphalt began work at Terminal 25. Schmidt and Allen walked the terminal

and identified the areas where the Port wanted Northwest Asphalt to perform asphalting work. It is undisputed that Schmidt specifically advised Allen that Northwest Asphalt was "not expected to perform work or apply asphalt near the western edge of the pier where it meets the water" and "not required to apply asphalt closer than at least fifteen feet of the western edge of the pier." Schmidt testified the edge of the pier was eroded but that the Port "had no concern over it" because "[i]t was not intended for use." When asked how close he thought the contractors would get to the edge of the pier, Schmidt replied, "Well, at the minimum, 12 feet. I wanted them to stay at least 15 feet back." Allen testified he and Schmidt discussed

> concerns about being close to the drop like that, you know, and that's when I found out the footages and what it would take to be able to get right up to the edge, and I told Steve [Schmidt], you know, [w]e'll just stay back from that area. The asphalt was in acceptable shape along the edge in the danger area, so we just determined to stay back an appropriate amount of footage from that area.

Allen also testified that Northwest Asphalt's plan was to stay 15-18 feet away from the pier's western edge. Allen understood guard rails would be required if Northwest Asphalt performed work any closer to the edge.[1] It is undisputed that Allen placed orange cones 15 feet from the pier's edge to identify the limits of the asphalting area.[2]

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[1] When asked how close to the edge of the pier Northwest Asphalt would be paving, Allen stated, "We were going to stay – after things were moved and then you could see the hazard, then at that point we knew there would be railings and all kinds of stuff to make it legal to be over to the edge. So our plan was to be, you know, 15, 17, 18 feet away from the edge."

[2] The record is unclear whether the cones were still present to mark the boundary when Northwest Asphalt commenced work on the project. See deposition of Steve Schmidt noting that when he arrived at the accident scene, he "noticed that the paver had been brought clear up to the area that had been coned off and that there was a man over the side"); (deposition of Larry Broderick stating that "there was no

Broderick was experienced in construction work, particularly road construction. Before starting with Northwest Asphalt in August 2008, he earned certifications for operation of heavy machinery and received training in workplace safety, including road construction safety and fall prevention. He started work on the paving job on August 27, 2008. He operated heavy machinery and helped prepare the area for paving. The next day, Broderick was assigned to help the laborers follow behind the asphalt paver and rake asphalt. Broderick testified he was directly supervised by Northwest Asphalt and not the Port.

> Q Okay. Port of Seattle had Northwest Asphalt come in to do asphalt paving, and you were directed by Northwest Asphalt, not the Port, right?
> A I worked for Northwest Asphalt, yeah.
> Q Well, you didn't take any direction from Port of Seattle employees; you took direction from Northwest Asphalt, right?
> A Correct.

Broderick does not dispute that he knew the jobsite was a pier, there was an obvious drop where the pier ended, and there were rocks below.

The morning of August 28, Broderick raked asphalt behind the paver for about two and a half hours. Allen temporarily left the Terminal 25 site that morning. While Allen was away, the asphalt paver moved to an area near the pier's edge to begin distributing asphalt. Witnesses testified that the paver was about 10 feet from the edge of the pier. Broderick stood with his back to the pier's edge.

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cones there" and that he would disagree with any witnesses who said there were cones present before he fell); (incident report written by Steve Schmidt stating, "Worker stepped past safety cones placed at edge of asphalt"); (postincident report written by John Hogan stating the same) (photos taken after Broderick's fall show cones placed near the edge of the pier).

The paver operator directed Broderick to step out of the way to allow the paver to turn. Without looking behind, Broderick stepped backward and fell off the edge of the pier (a ten and one-half foot drop) onto the rocks below, sustaining knee and head injuries. Broderick testified that the paver moved slowly, he had plenty of time to get out of the way, and he could have turned around to look where he was walking. Allen testified that Broderick fell because the paving crew mistakenly paved near the edge of the pier while Allen was away and because Allen failed to direct the crew to stay away from the edge. Schmidt testified that when he arrived at the accident scene, he "learned (contrary to [his] conversation with Mr. Allen) that Northwest Asphalt had applied asphalt close to the edge of the pier in an area that had not been requested by the Port." And "[the Northwest Asphalt workers] weren't supposed to be anywhere near [the edge of the pier]." That the workers brought the paver clear up to the edge of the pier was "a surprise" to Schmidt.

After its October 2008 investigation, the Washington Department of Labor and Industries (the Department) cited Northwest Asphalt for a serious safety violation for failure to install guardrails or barriers along the edge of the pier. The Department found the Port committed no health or safety violations.

In June 2009, Broderick sued the Port for negligence and damages stemming from his fall. He claimed the fall happened because a chunk of pavement gave way underneath him. Broderick testified that he "kind of blacked out" during the fall and had no personal knowledge that the asphalt gave way underneath him. Based on witness statements and an area inspection, Schmidt and Port employee John Hogan prepared

reports stating that Broderick lost his balance when "[t]he eroded asphalt paving underfoot gave way" and "a piece approximately 12" X 8" of eroded asphalt gave way under foot."

The Port moved for summary judgment dismissal, arguing no enforceable (1) common law duty of care for workplace safety, (2) statutory duty, or (3) common law duty of care to invitee. The trial court granted the Port's summary judgment motion, ruling no material issues of fact and no duty owed to Broderick as a matter of law.

ANALYSIS

Standard of Review

We review a summary judgment order de novo, performing the same inquiry as the trial court and considering facts and reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c).

To defeat summary judgment in a negligence action, the plaintiff must show that a genuine issue of material fact exists with respect to each element of a negligence claim: duty, breach of duty, causation, and injury/damages. Kennedy v. Sea-Land Serv., Inc., 63 Wn. App. 839, 856, 816 P.2d 75 (1991). "The threshold determination of whether the defendant owes a duty to the plaintiff is a question of law." Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 128, 875 P.2d 621 (1994).

Retained Control—Common Law Duty of Care and Statutory Duty[3]

[3] Because the retained control issue is common to both the common law duty

Broderick argues that the Port breached its duties under the Washington Administrative Code (WAC)'s waterfront safety provisions to (1) maintain the walking and working surfaces of its docks and terminals, (2) barricade surfaces in poor repair, and (3) install bull rails at the water edge of its docks. The Port responds that it owed Broderick no duty of ordinary care and no WAC duties because it retained no control over Northwest Asphalt's work.

A claim of negligence "requires the plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." Tincani, 124 Wn.2d at 127-28.

The Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, governs safety standards for employers. RCW 49.17.060 and WAC 296-155-040 impose a nondelegable duty on employers to comply with WISHA. RCW 49.17.060 provides:

> Each employer:
> (1) Shall furnish each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees . . . and
> (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

WAC 296-155-040 mirrors RCW 49.17.060 and provides in part:

> (1) Each employer shall furnish to each employee a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to employees.
> (2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do everything reasonably necessary to protect the life and

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and statutory duty questions, we combine the discussion under one heading.

safety of employees.

Chapter 296-56 WAC, promulgated under chapter 49.17 RCW, governs safety standards for longshore, stevedore, and waterfront related operations. Under the waterfront WACs, "[t]he structural integrity of docks, piers, wharves, terminals and working surfaces shall be maintained" and "[a]ll walking and working surfaces in the terminal area shall be maintained in good repair." WAC 296-56-60117(1), (4). The WACs also provide that "[d]itches, pits, excavations, and surfaces in poor repair shall be guarded by readily visible barricades, rails or other equally effective means" and that "[a]ll large openings or weakened surfaces shall be barricaded on all exposed sides with barricades equipped with blinkers, flashing lights, or reflectors." WAC 296-56-60225; 296-56-60117(6). The WACs also provide for vehicle protection on docks and wharves.

> (a) 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.
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> (b) The provisions of (a) of this subsection also apply at the edge of any fixed level above the common floor area from which vehicles may fall, except at loading docks, platforms and skids where cargo is moved by vehicles.

WAC 296-56-60123(1). Broderick claims the Port breached its duties under all of these WACs.

In Epperly v. City of Seattle, 65 Wn.2d 777, 399 P.2d 591 (1965), our Supreme Court considered a wrongful death action brought against the City by the widow of a contractor's employee. Guy Epperly died when he was struck by a falling cable while

working on the High Gorge Dam on the Skagit River. Epperly, 65 Wn.2d at 778. Epperly's employer, Merritt-Chapman & Scott Corporation (the contractor), strung cable across the gorge and secured it with a defective device that caused the cable to fall. Epperly, 65 Wn.2d at 780. The court found nothing in the contract between the City and the contractor that required the City to control the work or imposed any particular duties apart from the common law duty to furnish a safe place to work. Epperly, 65 Wn.2d at 785. On the common law duty, the court noted the general rule that a premises owner owes an employee of an independent contractor "the duty to avoid endangering him by his own negligence or affirmative act, but owes no duty to protect him from the negligence of his own master." Epperly, 65 Wn.2d at 785. The premises owner must keep the place reasonably safe for a contractor and the contractor's employees or subcontractors, but this rule does not apply "'where the work itself is of an unsafe nature or the defects are due to the imperfect and negligent work of the contractor himself.'" Epperly, 65 Wn.2d at 786 (quoting 2 Thomas G. Shearman & Amasa A. Redfield on Negligence § 279, at 689 (Clarence S. Zipp ed., 1941). Epperly held that because the City did not supervise the contractor's work and had no superior knowledge concerning the hazard, "[i]t had no duty arising either from the contract or from common law to inspect the contractor's facilities to protect the contractor's workmen from hazards incident to their use." Epperly, 65 Wn.2d at 787.

In Lamborn v. Phillips Pacific Chemical Co., 89 Wn.2d 701, 575 P.2d 215 (1978), James Lamborn, an independent contractor's employee, sued a third party employer (Phillips) for negligence and damages when he fell from the contractor's tank

truck while loading clear ammonia at Phillips's ammonia manufacturing plant. Lamborn, 89 Wn.2d at 703-05. Lamborn claimed that Phillips failed to provide a reasonably safe work environment and reasonably safe equipment. Lamborn, 89 Wn.2d at 705. The court cited Epperly for the rule that "[t]he 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." Lamborn, 89 Wn.2d at 707. The premises owner has "a duty to keep the premises under his control reasonably safe and to warn of dangers which are not obvious to the employee but are known to or discoverable by the owner in the exercise of reasonable care." Lamborn, 89 Wn.2d at 708. But the Lamborn court reiterated the "sound rule that an owner need not protect the servant of another from his own master's negligence." Lamborn, 89 Wn.2d at 708 (emphasis omitted).

In Kessler v. Swedish Hospital Medical Center, 58 Wn. App. 674, 794 P.2d 871 (1990), we considered a negligence action against Swedish Hospital. A window cleaner, Robert Kessler, worked for Pacific Window Cleaning Company. Pacific Window contracted with Swedish to wash the windows on a Swedish-owned building. Kessler, 58 Wn. App. at 675. Kessler fell from the ninth story of the building while cleaning the exterior windows from a ladder placed on the outside ledge. Kessler, 58 Wn. App. at 675. Kessler washed the windows from the outside, despite being warned by his employer not to use that technique. Kessler, 58 Wn. App. at 675. We applied the Restatement (Second) of Torts § 343A (1965) to invitees who are the employees of independent contractors. Section 343A provides: "(1) A possessor of land is not liable

to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." We held that Swedish owed no duty to Kessler under section 343A because his window washing technique was dangerous, the windows on the ninth floor were designed to be washed from the inside, and Kessler failed to show that Swedish should have anticipated the harm he sustained. Kessler, 58 Wn. App. at 678.

In Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002), Jeff Kamla worked for Pyro-Spectaculars (Pyro), which had contracted with the Space Needle Corporation to install a fireworks display. Kamla, 147 Wn.2d at 118. Kamla was installing fireworks on the 200-foot level when he inadvertently dragged his safety line across an open elevator shaft. The elevator traveled down the shaft and snagged Kamla's line, dragging him through the shaft and injuring him. Kamla, 147 Wn.2d at 118. The court held (1) no common law duty because the Space Needle retained no control over the manner of Pyro's work, (2) no WISHA liability because the Space Needle retained no contractual rights to control the manner in which Pyro and its employees completed their work, and (3) no business invitee liability given Pyro's expertise, Kamla's personal experience at the jobsite, and Kamla's own knowledge of the danger posed by the elevators. The Space Needle should not have anticipated that Kamla would drag his safety line across the open elevator shaft. Kamla, 147 Wn.2d at 122-27.[4]

[4] We recently reiterated the Kamla holdings in Afoa v. Port of Seattle, 160 Wn.

Under Epperly, Lamborn, Kessler, and Kamla, we conclude the Port owed Broderick no duty under the waterfront WACs and breached no common law duty to furnish a safe workplace.[5] Here no dispute exists that the Port retained no control over the manner in which Northwest Asphalt performed its work.[6] The contract between the Port and Northwest Asphalt expressly provided that Northwest Asphalt was solely responsible for construction means, methods, and procedures, as well as compliance with all relevant safety laws, regulations, and ordinances.[7] Northwest Asphalt agreed to be "solely and completely responsible for the conditions of the Project Site, including safety of all persons and property in performance of the Work." Under Kamla, because the Port retained no control over the work, no duty attached under WISHA to comply with the rules and regulations promulgated under chapter

App. 234, 244-48, 247 P.3d 482 (2011) (discussing (1) Kamla's rule that if a premises owner does not retain control over the manner and method of an independent contractor's work, the owner does not have a duty under WISHA to comply with the rules and regulations promulgated under chapter 49.17 RCW, and (2) Kamla's application of the "duty to business invitees" rule).

[5] WAC 296-56-60123(1) (requiring curbs or rails) applies to vehicle protection. The same WAC addresses employee protection and requires guardrails at locations where employees are exposed to falls of more than four feet, but explicitly creates an exception for loading platforms, docks, and waterside edges used for cargo or mooring line handling. WAC 296-56-60123(2)(a), (b). The apron at Terminal 25 was used for berthing vessels and for loading, unloading, and handling cargo, so guardrails for employee protection were not required.

[6] Broderick testified that he reported to Northwest Asphalt and the Port had no supervisory responsibility over his work.

[7] In its postaccident investigation report, the Department found that it was Northwest Asphalt's duty to install guardrails since it was working near the edge of the pier. It cited Northwest Asphalt for its failure to do so.

49.17 RCW, including the three WACs cited by Broderick.[8]

To the extent Broderick also alleges a general duty of "ordinary care" apart from the waterfront WACs, the Port breached no such duty. Under Epperly, premises owners must make the premises reasonably safe for a contractor and the contractor's employees or subcontractors, but this rule does not apply where the work is unsafe or the defects are due to the contractor's negligence. Epperly, 65 Wn.2d at 786. The undisputed evidence shows the Port and Northwest Asphalt discussed the need to avoid paving work within certain distances of the piers' edge. Based on their discussion, Schmidt concluded no work would occur within 12 to 15 feet from the edge. And Allen planned not to work within 15 to 18 feet from the edge. Allen conceded his absence from the job site and failure to direct the paving crew caused Broderick's fall. The Department found the Port violated no health or safety standards. Because Broderick presents no evidence that the Port provided an unsafe jobsite within the area contemplated for paving, the Port breached no common law duty to provide a reasonably safe work environment.

Invitee Status

Broderick argues that as an invitee, the Port breached its duty to him "to use reasonable care to discover the eroded asphalt." Appellant's Br. at 8. The Port

[8] Cf. Husfloen v. MTA Constr., Inc., 58 Wn. App. 686, 794 P.2d 859 (1990) (this court held that where a premises owner directed the construction of a residence on the premises, he occupied the same position as a general contractor and had a duty to comply—or ensure that employees of subcontractors complied—with safety regulations). In contrast, here the Port did not control or direct Northwest Asphalt's work.

responds it owed no duty to Broderick as a business invitee.

Washington has adopted sections 343 and 343A of the Restatement (Second) of Torts, which defines a premises owner's duty to invitees. Kamla, 147 Wn.2d at 125-26. Section 343 provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (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 the danger.

Restatement (Second) of Torts § 343. While a premises owner has a duty to keep premises reasonably safe, this rule "'does not apply where the work itself is of an unsafe nature or the defects are due to the imperfect and negligent work of the contractor himself.'" Epperly, 65 Wn.2d at 786 (quoting 2 Shearman, et al., supra, § 279, at 689). Premises owners are also generally not liable to invitees for harm caused by an activity or condition whose danger is known or obvious to the invitee.

> "'A possessor of land is not liable to his [or her] invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.'"

Kamla, 147 Wn.2d at 126 (emphasis omitted) (alteration in original) (quoting Iwai v. State, 129 Wn.2d 84, 94, 915 P.2d 1089 (1996) (quoting Restatement (Second) of Torts § 343A at 218).

As discussed above, Northwest Asphalt's job superintendent conceded that his absence from the job site and failure to direct the workers—including Broderick—to

stay away from the edge of the pier caused Broderick's fall. Broderick acknowledged that he recognized the danger posed by the edge of the pier. Northwest Asphalt intended its workers to stay away from the edge, knowing its potential hazard.

And, even assuming the Port knew that the asphalt near the edge of the pier was loose and broken up,[9] Broderick presents no evidence the Port should have anticipated that Northwest Asphalt would pave near the edge of the pier, perform its work negligently, or Broderick would fall. It is undisputed that Schmidt, the Port's senior construction inspector, met with Allen, Northwest Asphalt's job superintendent, before Northwest Asphalt began work at Terminal 25. Schmidt specifically advised Allen that Northwest Asphalt was not expected or required to apply asphalt closer than 15 feet from the edge of the pier. Allen confirmed that he was not expected to and did not intend to perform paving closer than 15 feet from the edge. It was "a surprise" to Schmidt that Northwest Asphalt brought the paver to the edge of the pier. Broderick testified that he was experienced in construction work, had completed numerous safety training classes, and recognized the danger of falling off the edge of the pier. Given this undisputed evidence, no reasonable trier of fact could find that the Port should have anticipated Broderick would fall off the pier's edge.

CONCLUSION

For the reasons discussed above, we affirm the trial court's order granting

[9] The Port argued below, and reiterates on appeal, that Broderick presented only inadmissible hearsay in support of his claim that the he fell due to a piece of asphalt giving way on the edge of the pier. See Resp't's Br. at 22-23 n.3. Given our disposition of this case, we need not address this argument.

summary judgment to the Port.[10]

WE CONCUR:

Spearman, J.

Cox, J.

[10] Broderick's wife, Tammy, brought a loss of consortium claim below. Tammy's claim arose from the injuries Broderick sustained in his fall from the pier. See Clerk's Papers at 4 ("As a further direct and proximate result of the negligent acts and omissions of the Defendant, plaintiff Tammy Broderick has incurred the loss and/or impairment of the care, service, companionship, society and consortium of her husband."). As discussed above, the Port is not liable for Broderick's fall, so Tammy's claim was properly dismissed in the summary judgment order.