

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

GARY RUSING and LAURENE )  
RUSING, husband and wife, and their )  
marital community; and LAURENE )  
RUSING on behalf of GARRETT M. )  
RUSING, a minor; and JUSTICE M. )  
RUSING, a minor; and GARY M. )  
RUSING, JR., a minor; and BRITTANY )  
ELSEVIER, a minor, )

Appellants, )

v. )

SKEERS CONSTRUCTION, INC. a )  
Washington corporation, and SAFECO )  
INSURANCE COMPANY OF )  
AMERICA, a Washington corporation, )  
SHERWIN-WILLIAMS COMPANY, an )  
Ohio corporation; )

Defendants. )

KEVIN'S GLASS, a sole proprietorship )  
and a general partnership; the ESTATE )  
OF KEVIN M. WHITING; and JACOB R. )  
WHITING, individually and as personal )  
representative of the Estate of Kevin M. )  
Whiting, ERIC C. WESTHAVER and )  
JANE DOE WESTHAVER, and their )  
marital community d/b/a R&R )  
FLOORCOVERING INSTALLATION, )

Respondents. )

No. 59019-7-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: January 7, 2008

PER CURIAM — Gary and Laurene Rusing appeal the trial court’s order granting summary judgment on their negligence claims. Rusing brought suit alleging Westhaver, Kevin’s Glass, and R&R Flooring negligently installed tile and grout in a bathroom, which allowed water to leak and produced toxic mold.

We affirm summary judgment because Rusing did not establish any material fact regarding negligent installation.

### FACTS

Gary and Laurene Rusing purchased a home from Skeers Construction in Bellingham, Washington in 1999. Prior to moving in, they noticed wet carpets in the master bathroom and suspected a leak, but did not identify the source. Over a four-year period, Rusing repeatedly asked Skeers to repair the problem and resulting damage to the floors. While living in the home, the Rusing family members experienced severe colds, bloody noses, rashes, and other allergies. According to Laurene Rusing these symptoms disappeared after moving out of the house. One son, Michael Rusing, developed terminal brain cancer, which Rusing attribute to exposure to toxic mold.

Skeers was the general contractor who constructed the house, but subcontracted with Sherwin-Williams to perform some specific work. Sherwin-Williams orally subcontracted with defendants R&R Flooring and Kevin's Glass to install the tile and shower door in the master bathroom. In 2003, Rusing had the home, specifically the bathroom, inspected to discover the source of the water leak. M.C. Smith, who was hired to perform the task, did not find any singular source of the leak. Another expert hired by Rusing concluded the leak was due to missing grout between the shower tiles. But he declined to speculate on whether the missing grout was caused by negligent installation, defective grout, or deterioration due to inadequate maintenance. Rusing had the

bathroom repaired in 2003.

In 2004, Rusing filed a complaint against Skeers Construction and Safeco Insurance claiming health problems caused by the “elevated levels of toxic mold” in the residence. In March 2005, Skeers filed a third-party complaint against Sherwin-Williams Company and Kevin’s Glass alleging breach of contract, breach of express and implied warranties, and contractual and implied indemnity. Later that same year, Sherwin-Williams filed a fourth-party complaint against R&R Flooring. Sherwin-Williams voluntarily dismissed its claims against R&R Flooring and Kevin’s Glass in 2006. Believing the leaks were due to missing grout from improper installation, on April 13, 2006, Rusing filed their amended complaint to include causes of action for negligence directly against Sherwin-Williams, Kevin’s Glass, the Estate of Kevin M. Whiting, Jacob Whiting, and R&R Flooring (Westhaver and R&R Flooring).

In June 2006, Rusings, Skeers, and Sherwin-Williams entered into a settlement agreement, whereby Sherwin-Williams agreed to pay \$200,000 to settle all claims and Skeers agreed to pay \$500,000.

In August 2006, Kevin’s Glass filed a motion for summary judgment arguing the claim of negligence should be dismissed on the basis that it was barred by the doctrine of completion and acceptance. In September 2006, R&R Flooring also filed its motion for summary judgment arguing that the claims were barred by the doctrine of completion and acceptance as well as statute of limitations and lack of evidence.

In October 2006, the trial court granted defendant's motion for summary judgment of plaintiff's common law negligence claims based on the doctrine of completion and acceptance. It rejected the statute of limitations as an alternative basis. In November of 2006, the trial court granted defendant's motion for summary judgment of plaintiff's negligent construction claim and claim for economic loss/property damage. It granted summary judgment on plaintiff's negligence construction and claims for economic loss/property damage because they were barred by the statute of limitations. The trial court also granted defendants' motion to strike portions of the declaration of Michael Showalter. Rusing appeals only the October 6, 2006 order dismissing the common law negligence claims.

#### DISCUSSION

Summary judgments are reviewed de novo, engaging in the same analysis as the trial court. See e.g. Roger Crane & Associates v. Felice, 74 Wn. App. 769, 875 P.2d 705 (1994). Both the law and the facts will be reconsidered by the appellate court. Folsom v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998). A trial court may grant summary judgment only "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Cowlitz Stud Co. v. Clevenger, LEXIS 612, 5-6 (2006) (citing Dep't of Labor & Indus. v. Frankhauser, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993)).

A summary judgment motion under CR 56(c) may be granted if the pleadings, affidavits, and depositions before the trial court establish that there is

no genuine issue of material fact and as a matter of law, the moving party is entitled to judgment. Dickinson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986). Material facts must be viewed in light most favorable to the nonmoving party. Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). A material fact is of such a nature that it affects the outcome of the litigation. Barrie v. Hosts of Am. Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). Generally, issues of negligence and proximate cause are not susceptible to summary judgment. Ruff, 125 Wn.2d at 703; LaPlante v. State, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). However, “when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” Hartley, 103 Wn.2d at 775.

Rusing alleges a common law claim of negligence against defendants. Negligence consists of (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; and (3) a resulting injury. Hansen v. Washington Natural Gas Co., 95 Wn.2d 773, 776, 632 P.2d 504 (1981). “For legal responsibility to attach to the negligent conduct, the claimed breach of duty must be a proximate cause of the resulting injury.” LaPlante, 85 Wn.2d at 159.

Here, respondents assert that Rusing failed to produce any material fact regarding whether they breached their duty and negligently installed the shower and grout. In Washington, building professionals are required to exercise a degree of skill, care, and learning possessed by members of their profession in the community. Riggins v. Bechtel Power Corp., 44 Wn. App. 244, 250, 722

P.2d 819 (1986). Thus, Rusings must show some material fact that respondents failed to exercise a degree of skill, care, and learning possessed by members of the community.

The record contains no material fact to support Rusing's claims that defendants' breached their duty and improperly installed the shower and grout. The declaration of Laurene Rusing and accompanying exhibits for example, indicate that she complained repeatedly to Skeers about the wet floor. There is no discussion or complaint however of the shower grout or improper installation of the shower.

The declaration of Michael Showalter opines that the damage was a direct result of negligent shower and grout installation. However, in November of 2006, the trial court granted defendant's motion to strike all portions of Showalter's declaration regarding whether Westhaver and R&R Flooring improperly installed the tile and grout. The Rusings did not appeal the order and the statements must be disregarded by this court. The Showalter declaration does not contain any material facts regarding negligent installation.

A second individual, Scott Anderson testifies in his deposition that missing grout was the likely the cause of the mold, but made clear that he could not ascertain the source of the missing grout.

Q: And you noticed that there was a gap and some grout missing, but did you determine whether at that time or ever what was actually causing the water leak?

A: Well, causing the water leak, my assumption—I'm not a professional—it was pretty obvious when there is no grout and everybody came to the same kind of determination when there's no grout in between the tile it gives the water a way to come down and

damage things.

Q: And you just said something very interesting. You said it was your assumption and you're not a professional. I would like you to—

A: I am not a professional tiler.

Q: And you haven't been asked to render an opinion in this case as to what was the cause of the water leak in this case, correct?

A: No, I have not been asked. It's obviously a tile thing; and you know, with grout and the certain distances between grout, I don't know what the specific recommendation is for how big a grout line has to be or if it was grout failure or if it was something else. But definitely, you know, by commons sense and experience that is definitely the cause of the problem.

In a subsequent question, Anderson was asked about his comments on the grout and explained:

Q: But you said earlier that you are not an expert and you don't have expertise and experience in installing showers or plumbing within a shower system or installing tile for that matter, right?

A: Nope. I don't install tile. I'm not an expert in tile. My job is to go in there and try to figure out where water is and what causes the problem. But to tell you if it's a construction defect or if the tile was installed wrong, that's not my job.

Q: That's not something you can tell us?

A: No.

Even viewed in the light most favorable to Rusing, Anderson does not establish any material fact regarding whether the missing grout was as a result of negligence on the part of Westhaver and R&R Flooring. His deposition merely supports the fact that grout was missing. He specifically declines to identify the cause of the missing grout.

In contrast, defendants provide the declaration of Eric Westhaver, who tiled the bathroom. Westhaver claims there was no grout missing when he completed the work. This testimony is not contradicted by any evidence

supplied by Rusing.

Even viewed in the light most favorable to Rusing, the non-moving party, the record contains no material fact regarding whether Westhaver and R&R Flooring breached its duty by installing tile and grout in a manner that fell below the degree of skill and care possessed by members of their profession. Further, although Rusing asks the court to retroactively apply Supreme Court precedent in Davis v. Baugh Industrial Construction, we need not reach the merits of the argument because we affirm summary judgment on other grounds. 159 Wn.2d 413, 150 P.3d 545 (2007).<sup>1</sup>

FOR THE COURT:

Appelwick, C.J.

Grosse, J.

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<sup>1</sup> See Robinson v. City of Seattle, 119 Wn.2d 34, 79, 830 P.2d 318 (1992).

Cox, J.