No. 97962-6

SUPREME COURT
OF THE STATE OF WASHINGTON

ADRIA MCGHEE,

Petitioner,

v.

CITY OF FEDERAL WAY,

Respondent.

RESPONDENT CITY OF FEDERAL WAY'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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A. Identity of Respondent

Respondent City of Federal Way, who was the defendant in the trial court, respectfully requests that the Supreme Court deny review of the decision designated in Part B of this answer.

B. Court of Appeals Decision

On November 12, 2019, the Court of Appeals, Division One, without oral argument, filed an unpublished opinion affirming the trial court's dismissal of Petitioner McGhee's personal injury claim. That opinion is appended to Petitioner McGhee's petition.

C. Restatement of Issues Presented for Review

Should the Supreme Court deny discretionary review because McGhee's petition fails to discuss or address RAP 13.4(b)(1)-(4)?

Should the Supreme Court deny discretionary review because respondent City of Federal Way submitted legally sufficient and *undisputed* evidence under CR 56(e) that the tree which fell onto McGhee's vehicle was not located within the City's right-of-way, and McGhee failed to meet her burden of presenting admissible evidence to the contrary, rendering dismissal appropriate as a matter of law?

D. Restatement of the Case

1. McGhee Alleged Personal Injuries from a Fallen Tree Limb

On Saturday, November 12, 2016, Appellant/Plaintiff Adria McGhee was driving south on SW 21st Street near the intersection with 2100 SW 330th Street in Federal Way, Washington, when a tree branch fell on her vehicle. Clerk's Papers (CP) at 21. The King County Fire Department responded and checked on the occupants of the vehicle, which included McGhee and her two minor children. CP at 26.

According to the Federal Way Police Report, no injuries were reported at the scene, but there was damage to the front windshield and roof of McGhee's car. CP at 26. The police moved the tree branch from the car to the sidewalk and requested that the City of Federal Way Public Works Department remove the branch from the sidewalk. CP at 26; CP at 35:22-36:3. This request generated a Citizen Action Request ("CAR"), titled CAR S-1116-0069. CP at 38:6-7; CP at 41.

In response to this service request, Gary Neiffer, a maintenance worker for the City of Federal Way Public Works Department, went to the scene of the accident. CP at 35:19-36:3. He removed the tree limb from the sidewalk. CP at 36:1-3. While at the

scene, Mr. Neiffer looked at the tree from which the limb had fallen. CP at 36:4-7. The tree trunk was approximately 15 feet behind the edge of the sidewalk. CP at 36:6. No other limbs appeared to be in danger of falling, and the tree itself appeared healthy. CP at 36:6-7.

Subsequently, the Streets Maintenance Supervisor, Gene Greenfield, visited the scene of the accident. CP at 38:12-15. He observed that the tree from which the limb fell was located ten feet or more behind the edge of the sidewalk, outside of the public right-of-way. CP at 38:14-15. Mr. Greenfield did not see any tree conditions that concerned him. CP at 38:13-14. Nor could he recall receiving any other CAR relating to that particular tree or other trees in the vicinity. CP at 38:13-14.

If the City of Federal Way had received a previous call or complaint regarding the tree, then a CAR would have been generated and sent to Mr. Greenfield. CP at 37:23-38:5. The City had no record of a CAR relating to the tree from which the limb fell, or other trees in the vicinity, prior to the incident that is the subject of this lawsuit. CP at 38:8-11. It was ultimately determined that the tree from which the branch fell was not within the City's public right-of-way. CP at 39:1-7; CP at 70:1-8.

Fourteen months later, McGhee filed suit against the City alleging that the tree was planted by the City and maintained on City property. CP at 1:20-21. She alleged that as a result of the tree branch falling on her car, she sustained general and special damages. CP at 1:23-24.

The City denied the minimalist complaint, and asserted the affirmative defenses of (1) failure to state a claim; (2) no act or omission that caused her damages; and (3) no actual or constructive notice of a dangerous condition, among others. CP at 4:15-21; CP at 6:1-3.

McGhee's answers to the City's interrogatories failed to identify any specific facts establishing that the City had actual or constructive notice of a dangerous condition or that the City did not correct such a condition. CP at 32:1-5. Instead, she answered that the City was legally liable regardless of whether it had "actual or constructive notice of the dangerous nature of the tree was present." CP at 32:8-9. When asked to describe all facts supporting her contention that the city or its employees/agents planted, preserved, maintained, owned, controlled or was otherwise responsible for the subject tree and the property on which it stood, McGhee answered that "discovery continues but it appears to be undisputed that the City

developed the area in question, including planting the tree that harmed Plaintiff." CP at 32:20-33:1.

2. THE CITY SUCCESSFULLY MOVED FOR SUMMARY JUDGMENT

The City moved for summary judgment dismissal of McGhee's negligence claim on two alternative legal theories: (1) the tree branch fell from a tree located outside of the public right-of-way; and/or (2) the City had no actual or constructive knowledge of the dangerous condition of the tree. CP at 8. The City relied on declarations from City employees, including Mssrs. Neiffer and Greenfield, and Ms. Mathena. CP at 10:23; CP at 69-70.

McGhee simply relied on her complaint and responded that the City failed to negate her (unpled) res ipsa loquitur claim; failed to establish that the tree was not in the right of way; and failed to establish that the City had no actual or constructive notice of the tree's alleged danger. CP at 42-45.

In the trial court (CP at 43) McGhee argued that Mr. Greenfield's declaration purportedly contained hearsay (he relied on a City engineer's verification that the tree was not within the City's right-of-way, CP at 39:1-3). The City addressed her concern and produced a declaration from the City's engineer directly verifying that the tree was not within the City's right-of-way. CP at 70:1-8.

The trial court properly granted summary judgment dismissal (CP at 71-72), ruling that the City established that there was no evidence to support McGhee's claim that the City "actually planted, preserved, maintained, controlled or otherwise was responsible for the tree involved in in the incident and the property on which the tree stood and additionally, that they had no actual or constructive notice of the dangerous condition." Verbatim Report of Proceedings (RP) at 6:4-12 (Nov. 9, 2018). McGhee appealed the trial court's ruling.

On November 12, 2019, the Court of Appeals affirmed the dismissal and opined that (1) McGhee failed to rebut the City's evidence; and (2) the City's evidence was properly submitted under CR 56(e). McGhee's petitions this Court for discretionary review.

E. Argument Why Review Should Be Denied

RAP 13.4(b) states that a "petition for review will be accepted by the Supreme Court only" if it meets one of four tests set forth in RAP 13.4(b)(1)-(4). RAP 13(c)(7) instructs a petitioner to explain why "review should be accepted under one or more of the tests established in section (b), with argument."

Here, McGhee neither discusses nor applies the RAP 13.4(b) criteria in in her petition. Her petition cites one case, but she neglects to apply it to her legal argument. *Compare* Pet. at 3 *with* Pet. at 6.

She inexplicably fails to discuss any of the cases upon which the Court of Appeals relied in affirming the trial court's dismissal of her case.

In sum, McGhee has given this Court no legally valid reason to accept review, other than her misguided understanding of CR 56(e), which, alone, does not demonstrate a conflict among the appellate courts; does not involve a significant question of law under the Constitution; and/or does not involve an issue of substantial public interest. *See* RAP 13.4(b). Review should be denied.

The City of Federal Way presented *undisputed* testimony that the subject tree was not within its right-of-way. Under CR 56(e), it was incumbent on McGhee to "not rest on the mere allegations" of her complaint, but to submit a "response, by affidavits or otherwise" that "must set forth specific facts showing that there is a genuine issue for trial." CR 56(e).

McGhee, the adverse party, neglected to respond with a showing of genuine issues of specific facts for trial. "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." *Id*. The trial court dismissed her claim as a matter of law, and the Court of Appeals correctly affirmed dismissal. *See Owen v. Burlington N. Santa Fe R.R. Co.,*

153 Wn.2d 780, 787, 108 P.3d 1220 (2005) ("Summary judgment is proper if the record before the trial court establishes 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting CR 56(c)).

F. Conclusion

Justice was served. McGhee's petition presents no significant point of law that must be decided or clarified. It satisfies none of the RAP 13.4(b) criteria. Accordingly, review should be denied.

Respectfully submitted this 9th day of January, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

Attorney for Appellant: David A. Williams 9 Lake Bellevue Drive, Suite 104 Bellevue, WA 98005	☒ VIA E-SERVICE, COA DIV. I ☐ VIA FACSIMILE ☐ VIA MESSENGER ☒ VIA U.S. MAIL
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I declare under penalty of perjury that the foregoing is true and correct.

DATED at Seattle, Washington on January 9, 2020.

/s/ Susan L. Klotz
Susan L. Klotz
Legal Assistant

FLOYD PFLUEGER & RINGER PS

January 09, 2020 - 1:36 PM

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Comments:

Respondent City of Federal Way's Answer to Petition for Discretionary Review

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