Supreme Court No. 98351-8
Court of Appeals No. 79132-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE CITY OF BELLEVUE,
Petitioner/Respondent/Defendant

vs.

SHANNON OGIER,
Respondent/Appellant/Plaintiff

On Appeal from the King County Superior Court
KCSC Case No. 08-2-22750-2SEA

RESPONDENT SHANNON OGIER'S ANSWER TO PETITION FOR REVIEW

BRIAN H. KRIKORIAN, WSBA #27861
KRIKORIAN LEGAL, PLLC
Ridgewood Corporate Square,
11900 N.E. 1st Street, Suite 300, Building G,
Bellevue, Washington 98005
818-219-1982
Attorneys for Appellant/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

I. IDENTITY OF RESPONDENT

Shannon Ogier asks this court to decline review of the City of Bellevue's (the City) Petition for Review of the Court of Appeals' decision reversing an order of summary judgment that dismissed Ogier's claims.

II. COURT OF APPEALS DECISION

The published decision was filed on March 2, 2020, and is attached to The City's Petition as Appendix "A."

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err by reversing the lower court's ruling on summary judgment that the City owed no duty to Ogier when she was injured after driving over an uncovered storm drain in the middle of NE 24th Street in Bellevue? Ogier submits that the Court of Appeals correctly reversed the dismissal of the lower court, and in fact, found that there was a long-standing, codified duty of care owed to Ogier.

This is a very straightforward case. The City, the owner, and maintainer of its roads and storm drains allowed a storm drain to remain uncovered in the middle of a busy Bellevue road. Ogier was injured when she drove over the uncovered hole in the roadway in the dark of night. The City seeks to point the finger to an unknown "joker" who uncovered the storm drain.[1] The City professes total ignorance and a lack of

1 See RT 14, lines 16-20. To this date, the City has been unable to identify anyone who could have opened the storm drain, and left it uncovered. As argued, *infra*,

responsibility for its roads and storm drains unless a conscientious citizen duly reports the missing utility hole cover. Until then, any imaginable, tragic incident could occur unless a good Samaritan comes forward. According to the City, it has no duty to prevent that tragedy. The Court of Appeals correctly rejected this argument.

The City also does not meet the requirements of RAP 13.4(b) to justify a review of the Court of Appeals' decision, in that the defense they asserted does not present any contradiction in the applicable law. The Court of Appeals' decision is quite clear as to the propriety of existing law related to the duty owed by the City and further that a motion for summary judgment was inappropriate as there were issues of fact to be determined.

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND OF THE CASE

On October 14, 2014, Shannon Ogier was driving her 2012 Hyundai Tucson west on NE 24th Street in Bellevue, Washington, when she drove over an uncovered storm drain manhole in the middle of the traffic lanes no NE 24th Street. Ogier identified the maintenance hole as located by the first, eastern entrance to the Westminster Chapel, on the northern side NE 24th Street, near 140th Avenue.[2] Ogier felt her driver side tires hit the storm manhole, which she recalls being located near the

---

the City openly concedes that almost "anyone" can do so.

2 CP 33-53 (Dep. of Plaintiff, Exhibit 2 to the Declaration of Cheryl A. Zakrzewski)

center dividing line of NE 24th Street.[3] Ogier identified with a red "X" on Exhibit 2 to her deposition, the approximate location of the storm manhole.

At the time of the incident, it was in the evening, and the area surrounding the open storm drain was very dark. The street was partially lit, and neither Ogier nor the responding police officer could see the open storm drain without the patrol car's headlights.[4] The storm drain (or manhole) cover was 10 to 15 feet away, placed on a sidewalk.[5] A City police officer put flares out on the roadway to avoid further incidents. No one knows how long this storm drain remained uncovered.[6]

Ogier submitted a claim for property damages for reimbursement of her deductible and to her insurer, State Farm, in October and December 2014. The City of Bellevue approved that claim and paid out property damage to Ogier and State Farm.[7] Ogier began experiencing discomfort in her left arm the following day.[8] Ogier claims she developed a frozen shoulder as a result of driving over this uncovered manhole on October 14,

---

3 *Id.* (Dep. of Plaintiff at p. 20, line 25 – p. 21, line 20)

4 *Id. (*Dep. Of Plaintiff, at 16:9-22); CP 85-133 (See Exhibit 4 to the Declaration of Brian H. Krikorian)

5 City employees who testified in depositions noted that it was highly unlikely this occurred as a result of a car or truck impact and was likely placed there by someone.

6 Contrary to the City's claim in its Petition at page 3, there is ***no*** evidence that the police officer replaced the manhole cover that night. The evidence cited merely implies the cover was replaced by the time of the City's inspection the next day (See CP 57, McQuilliams Declaration ¶9, Exhibit 1).

7 CP 85-133 (Exhibit 5 to the Declaration of Brian H. Krikorian)

8 CP 33-53 (Dep. of Plaintiff at p. 38, line 10 – p. 39, line 2).

2014. She made a follow-up claim to the City for her physical injuries.[9] The underlying lawsuit ensued.

1. *Testimony of Tony Badia (f/k/a Tony Shehab)*

At the time of the incident, Mr. Badia was a construction lead for the City, working in the storm and surface water department.[10] Mr. Badia testified that he was asked by his supervisor to inspect the storm drains on NE 24th Street, after Ogier's incident. Mr. Badia testified that at the time of his inspection, he noticed that there were no bolts in the covers along 24th Street. He dispatched a crew to lock down all the covers with bolts.[11]

Mr. Badia stated that the purpose of the bolts is:

> **To keep them [the covers] locked down and prevent them from coming up if a vehicle drives over them, *to prevent damage to personal property or city property*, and to prevent any incidents with any pedestrians on a sidewalk nearby if one does come off. (Emphasis added)[12]**

The criteria the city uses is if the storm drain covers are in the travel lane, and it is within a tire track, they are supposed to be bolted down.[13] Mr. Badia confirmed that the City has no system in place to inspect for open storm drains and that they rely upon "the traveling public."[14] Mr. Badia also confirmed that it is not uncommon to get calls regarding loose or

---

9 CP 85-133 (Exhibit 6 to the Declaration of Brian H. Krikorian)
10 *Id. Ex. 1 (*Deposition of Tony Badia, 5:11:24; 9:18-24)
11 *Id.* (at 10:15-24)
12 *Id.* (at 13:11-15; 15:24 to 16:6)
13 *Id.* (at 14:19-25)
14 *Id.* (at 15:7-16)

missing manhole covers, or catch basins.[15] Mr. Badia acknowledged that the manhole cover on NE 24th was in the area of traffic and that the open storm drain was "within both travel lanes."[16]

2. *Testimony of Jerry Campbell*

Mr. Campbell is a Skilled Worker for the City. He was dispatched by Mr. Badia to lock down the unlocked storm drain covers on NE 24th Street. His report indicated that of the covers he inspected, fourteen (14) covers were not locked down and needed bolts.[17] Mr. Campbell testified that the covers weigh 50 to over 200 lbs.[18]

Mr. Campbell testified that he could not think of anyone but the utility department who had access and authority to remove the storm drain covers, and that it was improbable that a car or truck knocked off the cover in issue.[19]

3. *Deposition of Don McQuilliams*

Mr. McQuilliams is the Operations Manager for Bellevue Utilities and was Superintendent of the Storm and Surface Water department at the time of the incident. Mr. McQuilliams testified that nobody has to "ask for permission" to remove a storm drain cover on a City street and that

---

15 *Id.* (at 22:4-15)
16 *Id.* (at 25:23 to 26:5)
17 CP 85-133 (Exhibit 5); *Id. Exhibit 2* (Campbell deposition, 8:5-21)
18 *Id. Exhibit 2 (*Campbell Deposition, 9:8-12); Don McQuilliams testified that the covers such as the one in this incident were closer to 75 to 100 lbs. CP 85-133 Exhibit 3 (McQuilliams Deposition, 15:12-16)
19 *Id. Exhibit 2 (*Campbell Deposition at 13:18 to 14:13; 16:1 to 17:6)

anyone including "consultants," "transportation folks," or Puget Sound Energy (PSE) can have access to and remove the storm drains.[20] Mr. McQuilliams stated that "consultants" could include not only consultants hired by the City, but by outside contractors and utilities.[21]

The City has no protocol or procedure to allow these various "entities" and individuals access to the City maintained storm drains and covers. The City does not require these outside individuals to "pull a permit" from the storm and water department of the City, nor put a work order into the City. Anyone with an "Allen wrench" can unlock the bolts on the covers and remove them.[22] An individual citizen can open and remove the storm drain covers, and the City has no measure to keep them from being improperly removed, nor would it know—one way or another—if such an incident occurred unless some "reports" it.[23]

The City also has no protocol or procedure in place to determine if manhole or storm drain covers, in traffic or on sidewalks, are left uncovered. The only protocol in place is to wait for a person to "report" the situation to the City.[24] The City has no enforceable procedure to ensure that whoever removes a storm drain cover has obtained permission to access the same from the City. Mr. McQuilliams testified that the

---

20 CP 85-133, *Exhibit 3 (*Deposition of Don McQuilliams, 9:7-24)
21 *Id.* (at 10:3-12)
22 *Id.* (at 10:23 to 11:11)
23 *Id.* (at 11:12-17; 11:22-24; 12:3-6)
24 *Id.* (at 12:3-9; 15:25 to 16:24)

proper process is for the outside entities and consultants to get "right of way" permits from the transportation department (not stormwater or sewers), but that the City does not heavily enforce this, and that often (especially with "consultants") these procedures are not followed.[25] At the time of the incident in issue, the City had no system or plan in place to make sure that storm drains were not left uncovered and only regularly inspected the storm drains every five years.[26]

B. PROCEDURAL BACKGROUND OF THE CASE

The City moved for summary judgment, arguing it did not owe a duty of care to Ogier, because it did not have actual or constructive notice that the storm drain was left open, and uncovered, until Ogier drove over the empty hole in the middle of the street, and was injured. The City argued, and the lower court agreed, that the City is not the insurer of its streets and cannot be everywhere all the time. As such, the lower court agreed found that the City did not owe a duty of due care to Ogier.[27]

On March 2, 2020, the Court of Appeals, Division I, reversed. In its published decision, the Court re-affirmed long-standing Supreme Court

---

25 *Id.* (at 16:25 to 17:16; 17:23 to 18:6; 18:11-18). The City has no record of anyone pulling a permit or getting a "right of way" access permit for the date in question. In other words, the City has no idea who pulled off the storm drain cover on NE 24th Street, or how long it was opened (see CP 33-53, Paragraph 5)

26 CP 85-133, *Exhibit 3 (*Deposition of Don McQuilliams, at 12:15 to 13:2)

27 RT 13, line 18 to page 17, line 23

and Court of Appeal precedent that the City indeed owed a duty to Ogier, and further, that issues of fact remained to be decided by the trial court.

V. ARGUMENT

A. THERE IS NO LEGAL BASIS TO GRANT REVIEW

RAP 13.4 (b) provides that a petition for review will be accepted by the Supreme Court: (1) if the decision of the Court of Appeals conflicts with a decision of the Supreme Court; (2) if the decision of the Court of Appeals conflicts with a decision of another division of the Court of Appeals; (3) if a significant question of law under the Constitution of the State of Washington or the United States is involved; or, (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The City cannot meet any of the requirements of RAP 13.4(b). First, contrary to the City's argument, the decision of the Court of Appeals did not create a conflict of law between another division of the Court of Appeals or the Supreme Court. Second, there is no signification question of law under the Washington Constitution or the United States Constitution. Finally, there is not a substantial public interest in the appeal of the City, as the Court of Appeals applied long-settled law to this case. This case does not affect the public at large. Nor does the Court of Appeals' decision create the "Chicken Little" scenario the City claims—namely that cities will now have to be "insurers" of public safety on

streets and sidewalks. Such a reading of the decision strains normal logic.

B. THE COURT OF APPEALS DECISION NEITHER CONFLICTS WITH EXISTING LAW NOR CREATES AN ONEROUS DUTY TO CITIES

1. *Washington Has Long Held that the City Is Responsible for Maintaining its Roads and Property for Safe Use*

The City had an affirmative duty to maintain streets in a reasonably safe condition, to reasonably and adequately warn users of any inherently dangerous or deceptive conditions, and, in certain instances, to erect and maintain adequate barriers. *Bartlett v. Northern Pac. Ry. Co.*, 74 Wash.2d 881, 447 P.2d 735 (1968); *Smith v. Acme Paving Co.*, 16 Wash.App. 389, 558 P.2d 811 (1976). A city's duty of ordinary care to maintain reasonably safe streets extends as a matter of law to the traveling public. *Bradshaw v. City of Seattle*, 43 Wash.2d 766, 773, 264 P.2d 265, 42 A.L.R.2d 800 (1953); *Wojcik v. Chrysler Corp*., 50 Wash.App. 849, 857–58, 751 P.2d 854 (1988); *Raybell v. State*, 6 Wash.App. 795, 496 P.2d 559 (1972). The question of whether a general field of danger should have been anticipated is *generally* one of fact. *Berg v. General Motors Corp.*, 87 Wash.2d 584, 555 P.2d 818 (1976).

While the City argued, and the trial court agreed, that it is not the "insurer" of safety on its city streets, such an argument should be relevant only where the plaintiff has deviated from properly using the right of ways. In *Hansen v. Washington Natural Gas Co.,* 95 Wash.2d 773, 777,

632 P.2d 504 (1981), the Washington Supreme Court held that the above standard is applied where the person injured uses the roadways in a proper manner and exercises due care for their safety (rejecting liability against the defendant where the plaintiff was jaywalking). See also *Gunshows v. Vancouver Tours & Transit, Ltd.*, 77 Wash.App. 430, 433, 891 P.2d 46 (1995) (no duty to protect plaintiff against his own negligence if the intersection was safe for ordinary travel); *McKee v. City of Edmonds*, 54 Wash.App. 265, 267, 773 P.2d 434 (1989) (no duty to protect jaywalkers from falling in holes when safe crosswalks are provided); *Braegelmann v. County of Snohomish*, 53 Wash.App. 381, 766 P.2d 1137 (1989) (no duty to protect against exceedingly reckless driving); *Prybysz v. City of Spokane*, 24 Wash.App. 452, 458–59, 601 P.2d 1297 (1979) (bridge guardrails sufficient if they provide ordinary safety).

Here there is no question that Ogier was properly utilizing the City's streets and was exercising due care at the time of the incident. She was on an accepted, well-traveled roadway in Bellevue; she was traveling cautiously (there is no evidence Ogier was in any way violating laws or driving negligently); she was where she was supposed to be. Under the general rule in the State of Washington, the City owed Ogier the duty of care to ensure that the streets she traveled on were reasonably safe, and to institute measures to ensure that incidents such as this one did not happen.

One of the City's assertions is that it has no way to control access to the City's storm drain covers, as any consultant or third-party utility can access those storm drains, remove the covers, and leave them off. The City, instead, relies upon its citizens to "report" such dangers.[28] Therefore it is not negligent absent "actual" or "constructive" notice of the danger. Washington courts have rejected this argument for over a century. In *Lasityr v. City of Olympia*, 61 Wash. 651 (1911), the City of Olympia permitted an abutting landowner and its contractor to lay out a cement sidewalk. Plaintiff was injured in the evening when he tripped or fell over the wire netting stretched across the sidewalk in front of the store building. As in this case, the City of Olympia denied liability on the theories that it lacked notice of the obstruction, and that it delegated the duty to the abutting landowner. The Washington Supreme Court rejected this defense, holding at 655:

> **'There are some authorities which hold a municipality responsible for the negligence of one who, acting under its license or permission lawfully granted, creates any defect or obstruction which endangers the safety of persons using the streets. These cases proceed upon the theory that, being charged with the care of its streets, it is the duty of the city to supervise the work permitted to be done and to use suitable precautions to prevent accidents; and notice of the defect or obstruction in the street is not necessary in such case to fix the city's liability.' 28 Cyc. 1355. *Such is the rule adopted in this state*. In Sutton v. Snohomish, supra, the court said: '*The fact that a permit was granted was notice to the authorities that the work was in progress, and they were then charged with the duty of seeing it was properly conducted.*' (Emphasis added)**

28 CP 85-133 *Ex. 1 (*Badia Deposition, at 15:7-16)

As noted above, simply because the City delegates use of its roadways and walkways to outside contractors, owners or utilities, does not relieve it of its duty to ensure that the passageways are safe to the traveling public. In this case, the City has no checks, balances, or protocols in place to ensure that if an errant consultant or contractor accesses the ***City's*** storm infrastructure, that there are safeguards in place to avoid hazards. Here, the City has absolutely ***no*** idea who opened the storm drain on NE 24th. None. It cannot even direct Ogier to the appropriate agency or consultant who *might* have accessed the storm drain on October 14, 2014.[29] Instead, it stands upon the hope that some dutiful citizen will report such a hazard before someone is injured, or worse, killed. This logic is a clear breach of its duties owed to the traveling public, like Ogier—especially when she did nothing wrong and was not acting negligently or recklessly. She was simply driving on the street, as intended. See, for example, *Smith v. Acme Paving Co.,* 16 Wash.App. 389, 394 (1976)(stating: "We think the rule is particularly applicable where the conditions complained of arise out of the actual construction, repair, and maintenance of the roadway).

Once the primary duty is established as a matter of law, the remaining elements—breach, proximate cause, and damages—are the

29 CP 33-53 (¶5 of the Cheryl Zakrzewski declaration)

factual questions for the jury. *Keller v. City of Spokane*, 104 Wash.App. 545, 553 (2001), citing *Torres v. City of Anacortes*, 97 Wash.App. 64, 73, 981 P.2d 891 (1999), review denied, 140 Wash.2d 1007, 999 P.2d 1261 (2000); *Griffin v. West RS, Inc.*, 97 Wash.App. 557, 572, 984 P.2d 1070 1999), review granted, 140 Wash.2d 1017, 5 P.3d 9 (2000). Here the City had a duty. Whether that duty was breached and caused damages is an issue for the trier of fact. The lower court erred by finding the City did not owe a duty of care to Ogier, and the Court of Appeals correctly reversed that ruling and ordered the case remanded.

2. *Alleged "Lack" of Actual or Constructive Notice Is Not the Test of Negligence in This Case*

The City's primary challenge to Ogier's claim is that the City did not have actual or constructive notice of the uncovered storm drain on NE 24th Street and relies upon citizenry or others to report such hazards. However, such an argument ignores the plethora of Washington case law, going back over a century, that holds that lack of "notice"—alone—is not a defense to a negligence case. Moreover, the notice requirement does not apply to dangerous conditions created by the governmental entity or its employees or to conditions that result from their conduct. *Batten v. S. Seattle Water Co.*, 65 Wash.2d 547, 550–51, 398 P.2d 719 (1965). Nor is notice required where the City should have reasonably anticipated the condition would develop. WPI 140.02 & cmts. 2012; *Argus v. Peter*

Kiewit Sons' Co., 49 Wash.2d 853, 860–61, 307 P.2d 261 (1957)(see partial dissent: "The contractor was under a duty to observe ordinary care to maintain the detour in a condition which would be safe for public travel. This duty involved the anticipation of defects which would result from the natural and ordinary use of the detour by vehicular traffic. *The contractor could not stand by passively until a defect or dangerous condition developed and an accident occurred, and thereafter escape liability because there had been no actual or constructive knowledge or notice of the specific defect or the dangerous condition*.) (Emphasis added). If the government entity created the unsafe condition either directly through its negligence or if it was a condition that the governmental entity should have anticipated, the plaintiff need not prove notice. See *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wash.2d 745, 748, 375 P.2d 487 (1962); *Nguyen v. City of Seattle*, 179 Wash. App. 155, 165–66, 317 P.3d 518, 523–24 (2014)

In *Hayes v. City of Seattle*, 43 Wash. 500, 501 (1906) the plaintiff fell into an opening on a sidewalk which was covered by iron doors. The doors acted as a "kind of a barrier" to pedestrian traffic when opened. On this occasion, only one door was opened. When the plaintiff walked over the closed door, he did not realize the other door was open and fell through the opening. The Supreme Court noted that no one knew how long the doors had been open, noting it could have been open anywhere

from "moments at the longest" to an "instant before the accident." The City of Seattle claimed it was not negligence to permit an opening to be made in a sidewalk, and it was not liable unless it knew, in time to correct it, of the fact that it is negligently used. The Supreme Court rejected the city's argument, stating: "***These facts the city knew or ought to have known*, and we think the court rightly held it responsible for the injury." (Emphasis added)**

In *Connolly v. City of Spokane*, 70 Wash. 160 (1912), a pedestrian was injured in a similar accident, falling through a trap door on a sidewalk. After a verdict in favor of the injured plaintiff, the City of Spokane argued that the evidence was insufficient to show that the city had notice of the negligent condition. As is the case here (and in *Hayes, supra*), neither the plaintiff nor the City of Spokane could identify the exact reason the trap door failed, how long the trap door had been defective. Relying upon *Hayes* supra, the Supreme Court rejected the City's lack of notice argument, holding that the city should have known or ought to have known of the hazard. *Id.* at 163. See also *Tubb v. City of Seattle*, 136 Wash. 332, 335 (1925), relying upon *Hayes* and *Connolly*, and stating that "under the doctrine of the cases mentioned, whether the appellant was negligent on account of the hatchway being open without a

man present to warn persons of the danger thereof was a question for the jury."[30]

In this case, the City should have known, or ought to have measures in place to know, about the hazard that caused plaintiff injury, who caused it, and how long it was like that. NE 24th Street is a well-traveled road in the City of Bellevue, and at the time of the accident, it was dark and poorly lit. The open storm drain was likely in that condition that for some time.[31] At a minimum, the City should have locked down the manhole covers;[32] and, if the City is going to allow any "consultant" or a third party to access these storm drain covers, it should have a better system in place to monitor who is accessing those drains.

3. *There Is No Conflict with the Cases Cited by the City*

---

30 In *Wilson v. Salt Lake City*, 13 Utah 2d 234, 236 (1962), the plaintiff sued Salt Lake City when the right rear wheel of their vehicle crashed through a defective manhole lid. Salt Lake City (like the City here) argued it did not have constructive or actual notice of the manhole lid's defect, and therefore was not negligent. Citing to previous authority, the Utah Supreme Court stated: "The question of notice is not alone determined from the length of time a defect has existed, but also from the nature and character of the defect, the extent of the travel, and whether it is in a populous or sparsely-settled part of the city…**The question as to whether the acts and conduct of appellant, [the city] and the facts, as shown by the evidence, constitute negligence was one for the jury to pass upon….**'" (Emphasis added).

31 CP 85-133 *Ex. 2 (*Campbell deposition at 13:18 to 14:13; 16:1 to 17:6)

32 The City's argument as to proximate cause must also fail. While the City argues that the "locking" of the manholes, in and of themselves, may not have "caused" the accident, the fact they were unlocked is simply one element of proof that the City was not taking reasonable care of the streets of Bellevue. Moreover, the argument that "the manhole covers could easily be removed with simple tools even when bolted in place" (CP 31) supports Ogier's case. To quote Shakespeare, "therein lies the rub": If the manhole covers can be so easily removed by "anyone", the City should have a better system in insuring that they aren't left uncovered to the detriment of innocent citizenry. The failure to have such a system goes to breach and causation and is left to the trier of fact to decide if that is negligence.

In its oral ruling, the lower court relied heavily on *Nguyen v. City of Seattle*, 179 Wn.App. 155, 317 P.3d 518 (2014) for the proposition that the City did not owe a duty of care to Ogier. In *Nguyen*, the plaintiff was driving a rented U-Haul truck on Olson Place Southwest in Seattle, traveling 25 to 30 miles per hour. While going down Olson Place, Nguyen struck the branch of a tree which protruded from the trunk into the roadway. Nguyen later sued the City of Seattle, arguing that the City negligently maintained the tree, which protruded into the roadway. Following a 3-day bench trial, the court concluded that the City breached no duty to maintain Olson Place Southwest in a reasonably safe condition and that no act or omission by the City proximately caused Nguyen's accident. The Court further found that the City was not liable and that they did not have notice either constructive, certainly not actual, of the problem with this tree.

On appeal, the Court of Appeals affirmed, finding that the substantial evidence elicited at trial indicated the City of Seattle did not have a duty of care to ensure that plaintiff's "box truck" did not strike the tree. In his concurring opinion, Justice Grosse stated that he felt the majority incorrectly emphasized the notice requirements as an "element" of negligence in these types of cases:

> ***Notice is not an element of such a claim***….[] Simply put, the focus remains on establishing the government's duty and a breach

> thereof, not on whether the governmental entity had notice of the danger. *Nguyen* at 173-4

In its brief to the Court of Appeals, the City cited to *Argus v. Peter Kiewit Sons' Co.*, 49 Wn.2d 853, 856, 860–61, 307 P.2d 261 (1957) and devoted ten lines to the *Argus* decision. Here, the City devotes almost three pages to *Argus*. However, the Court of Appeals' decision is neither in conflict with *Nguyen* nor *Argus.* First—*Argus* involved a lawsuit against a private contractor working on a state highway—not a municipality or the state. As such, as the City is the owner and maintainer of the roads and storm drain, the analysis should end there. Even so, as noted in the partial dissent in *Argus*, the rule set forth is not in conflict with the Court of Appeals' decision here. The court held that the jury instructions were flawed in that they stated that the contractor had a ***greater*** duty than the law required—not that the contractor had ***no*** duty. As noted in the dissent, consistent with the Court of Appeals' decision here, the defendant still is held to a duty to anticipate any reasonable hazard. Second—there was no doubt as to who the contractor was. Here, as the lower court conceded at oral argument, the City cannot even identify who the "joker" is who removed the cover.[33]

Finally—the biggest problem with the City's reliance upon *Nguyen* and *Argus* as dispositive is a procedural and evidentiary one. The *Nguyen*

33 RT 14, lines 16-20

decision was based upon a 3-day bench trial—not a motion for summary judgment. In *Argus*, the appeal was from a jury trial, and the Court remanded the matter for a new trial—it did not dismiss the case. Neither of those decisions were addressing a summary judgment motion. The reviewing courts in both cases applied a completely different standard to determine if the lower court made the right decision. As the Court of Appeals confirmed in its decision here, this was an appeal from a summary judgment, not a trial, and there are ample issues of fact to be determined.

VI. CONCLUSION

Here, the lower court erroneously concluded that—as a matter of law—the City owed absolutely no duty to Ogier to ensure there was no open storm drain on its streets. The lower court went so far as to posit it would be unreasonable for the City to have such a duty, as it would require the City to post someone on every street corner to have notice of the danger.[34] The City continues to make that argument. However, that certainly is not what the standard is. The focus, as stated by Justice Grosse above, "remains on establishing the government's duty and a breach thereof, not on whether the governmental entity had notice of the danger." The Court of Appeals correctly found that there were a plethora

34 RT 13, line 18 to page 17, line 23

of factual issues to be determined on whether the City breached its existing duties. When one considers this was a motion for summary judgment, the Court of Appeal's reasoning becomes unassailable.

For these reasons, the City's Petition should be denied.

Respectfully submitted,

Dated: April 28, 2020

KRIKORIAN LEGAL, PLLC

By_____
Brian H. Krikorian, WSBA # 27861
Attorneys for Respondent Shannon Ogier

LAW OFFICES OF BRIAN KRIKORIAN PLLC

April 28, 2020 - 1:07 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98351-8
Appellate Court Case Title:	Shannon Ogier v. City of Bellevue

The following documents have been uploaded:

- 983518_Answer_Reply_20200428130553SC111738_6900.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review F copy.pdf

A copy of the uploaded files will be sent to:

- CBarnes@bellevuewa.gov
- czakrzewski@bellevuewa.gov
- jbanks@bellevuewa.gov

Comments:

Sender Name: Brian Krikorian - Email: bhkrik@bhklaw.com
Address:
PO BOX 57396
SHERMAN OAKS, CA, 91413-2396
Phone: 818-219-1982

Note: The Filing Id is 20200428130553SC111738