

67931-7

67931-7

No. 67931-7-1

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

NANCI MILLSON, Appellant

v.

CITY OF LYNDEN, TIM & HELEN NEWCOMB, Respondents.

BRIEF OF APPELLANT

Richard C. Platte, WSBA #4757
Attorney for Appellant
336 36th Street, #387
Bellingham, WA 98225
(360) 647-5145

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 APR 19 AM 11:21

TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR	3
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
STATEMENT OF THE CASE	3
A. NANCI'S FALL	3
B. NANCI'S COMPLAINT	4
C. LYNDEN'S SUMMARY JUDGMENT MOTION	5
D. NANCI MILLSON'S SUMMARY JUDGMENT MOTION	5
E. THE SIDEWALK LIFT	5
1. Did Lynden Have Notice of the Sidewalk Condition?	5
2. Did Lynden Violate Sidewalk Safety Standards?	8
3. Was The Risk Posed By the Sidewalk Lift Obvious or Known to Nanci Millson Before Her Fall?	10
ARGUMENT	14

A.	FIRST ISSUE: the trial court exceeded its discretion by weighing the evidence presented by the parties and resolving material questions of fact in favor of Lynden	14
1.	Summary Judgments, Generally	14
2.	Summary Judgments In Sidewalk Cases Like This	16
3.	Liability of Cities In Sidewalk Cases	17
4.	Lynden’s Duty To Nanci	18
5.	Notice To Lynden Of The Dangerous Sidewalk	20
B.	SECOND ISSUE: the trial court committed error by failing to grant Nanci Millson’s summary judgment motion where the undisputed facts established that Lynden violated its duty to Nanci and there was mere speculation regarding negligence on the part of Nanci Millson to negate that duty	22
1.	Lynden’s “Open And Obvious” Argument ..	22
2.	The Sidewalk Lift Was Not “Open” or “Obvious” to Nanci Millson, Who Was Not Required to Keep Her Eyes Riveted to the Sidewalk	23
3.	Public Policy Considerations	26
	CONCLUSION	27

TABLE OF AUTHORITIES

CASES

<i>Albin v. National Bk. of Commerce</i> , 60 Wn.2d 745, 748, 375 P. 2d 487 (1962)	20
<i>Apker v. City of Hoquiam</i> , 51 Wash. 567, 99 P. 746 (1909)	21
<i>Austin v. City of Bellingham</i> , 45 Wash. 460, 88 P. 834 (1907)	21
<i>Beers v. Ross</i> , 137 Wn.App. 566, 570, 154 P.3d 277 (2007)	14
<i>Berglund v. Spokane County</i> , 4 Wn.2d 309, 313, 103 P.2d 355 (1940)	18
<i>Blasick v. City of Yakima</i> , 45 Wn.2d 309, 274 P.2d 122 (1954)	16, 18
<i>Clevenger v. The City of Seattle</i> , 29 Wn.2d 167, 169-172, 186 P.2d 87 (1947)	24
<i>Devenish v. City of Spokane</i> , 21 Wash. 77, 57 P. 340 (1899)	21
<i>Fletcher v. City of Aberdeen</i> , 54 Wn.2d 174, 177, 338 P.2d 743 (1959)	20
<i>Holland v. Auburn</i> , 161 Wash 594, 297 Pac. 769 (1931)	21
<i>Howard v. Horn</i> , 61 Wn.App. 520, 810 P.2d 1387 (1991)	22-23, 26-27

<i>Johnson v. City of Ilwaco</i> , 38 Wn.2d 408, 229 P.2d 878 (1951)	18, 19
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002)	18-19
<i>Kennedy v. Everett</i> , 2 Wn.2d 650, 654, 99 P.2d 614 (1940)	24
<i>Lorence v. City of Ellensburg</i> , 13 Wash. 341, 43 P. 20 (1895)	21
<i>Meissner v. City of Seattle</i> , 14 Wn. App. 457, 459, 542 P.2d 795 (1975)	23
<i>Morris v. McNichol</i> , 83 Wn.2d 491, 519 P.2d 7 (1974)	14
<i>Nibarger v. City of Seattle</i> , 53 Wn.2d 228, 229, 332 P. 2d 463 (1958)	17, 20
<i>Shearer v. Town of Buckley</i> , 31 Wash. 370, 72 P. 76 (1903)	21
<i>Skaggs v. General Electric Co.</i> , 52 Wn.2d 787, 790, 328 P. 2d 871 (1958)	19-20
<i>Smith v. City of Aberdeen</i> , 7 Wn.App 664, 665-667, 502 P.2d 1034 (1972)	18, 19
<i>Sutton v. City of Snohomish</i> , 11 Wash. 24, 39 P. 273 (1895)	20-21
<i>Todd v. Harr, Inc.</i> , 69 Wn.2d 166, 417 P.2d 945 (1966)	23

WASHINGTON PATTERN INSTRUCTIONS

WPI 140.01 18

INTRODUCTION

In the early afternoon of July 2, 2007, Nanci Millson was out for a walk in Lynden. Her walk that day took her to Dogwood Street, where she fell and was injured.

Before she reached Dogwood Street, she observed that sidewalks on Cherry Street were in poor condition, with breaks and rises, and when she approached those conditions on Cherry Street, she left the sidewalk and proceeded on the street.

Eventually, Nanci's walk took her to Dogwood Street. Nanci had walked on Dogwood Street a couple of times before the fall, but the last time had been a year or two earlier, and she had never walked in a northbound direction on the west side of Dogwood Street where her fall occurred. She picked up speed because the condition of the sidewalk looked better than what she had encountered on Cherry Street.

As she was walking on the sidewalk on Dogwood Street, she looked over at some neighbors who had just pulled up in their car across the street, and then suddenly and without warning, she tripped on an elevated (approximately one and a half to two inches) sidewalk lift, which she hadn't seen. She then flew to the ground, landing on her hands, shoulders, face and ribs.

Plaintiff's initial complaint named only the City of Lynden as a defendant, but after the City alleged that defendants Newcomb were

responsible for the sidewalk condition that caused her fall, the Newcombs were added as additional defendants to the lawsuit.

Defendant Lynden sought a summary judgment order dismissing Plaintiff's lawsuit on the basis that the sidewalk rise was obvious, such that Lynden owed no duty to Plaintiff, and Defendants Newcomb joined in the Lynden's summary judgment motion.

Plaintiff contested Lynden's motion and also sought a summary judgment order establishing fault on the part of Lynden as a matter of law, based in part on the declaration of an arborist who opined that (1) the lifted edge of the sidewalk that caused Nanci's fall had surpassed the hazard threshold for at least three and a half years before her accident, such that Lynden should have inspected, observed, and repaired the lift long before Nanci's fall; and (2) Lynden had authorized the planting of Sweetgum trees in a planting area that it should have known was too small, such that it was inevitable that the tree roots would cause the sidewalk to lift.

Lynden did not challenge the opinions of the arborist. Instead, Lynden relied on portions of the arborist's declaration to support Lynden's argument that the sidewalk lift that caused Nanci's fall was "obvious", such that Nanci's negligence in not avoiding the obvious condition that caused her fall superceded any duty owed by Lynden.

The trial court granted Lynden's motion, and Nanci filed this appeal.

ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. The trial court erred in entering its order of October 28, 2011, granting Defendant City of Lynden's Motion for Summary Judgment.

2. The trial court erred in not entering Plaintiff's proposed order granting partial summary judgment re liability against Defendant City of Lynden.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court exceed its discretion by weighing the evidence presented by the parties and resolving material questions of fact in favor of Lynden?

2. Did the trial court commit error by failing to grant Plaintiff's summary judgment motion where the undisputed facts established negligence on the part of Lynden?

STATEMENT OF THE CASE

A. NANCI'S FALL

In the early afternoon of July 2, 2007, Nanci Millson was out for a walk in Lynden. On the day of her walk/fall, she noted sidewalks in

very poor condition “in the south side of Greenfield Village”, on Cherry Street (CP 81, 84), but when she got to Dogwood Street, where she fell, she observed that the sidewalk there was in better condition (CP 85: p. 62, lines 5-13), such that she was able to “pick up speed because the sidewalks, I thought, were better than where I had been” (CP 81: p. 31, lines 18-21).

As she was walking along the sidewalk on Dogwood Street, she looked over at some neighbors who had just pulled up in their car across the street, and then suddenly and without warning tripped on an elevated (approximately one and a half to two inches) sidewalk lift, which she hadn't seen. She then flew to the ground, landing on her hands, shoulders, face and ribs. (CP 80-84, 89-90)

B. NANJI'S COMPLAINT

Plaintiff's initial complaint (CP 211-215) was against Lynden, only, but after Lynden alleged that defendants Newcomb were responsible for the sidewalk condition that caused her fall, the Newcombs were added as additional defendants (CP 107-113).

C. LYNDEN’S SUMMARY JUDGMENT MOTION

Lynden sought a summary judgment order (CP 98-106)

dismissing it as a defendant in this lawsuit on the claimed basis that it owed no duty to the plaintiff because:

1. the sidewalk rise (described by Lynden as a “raised joint/crack”) was “obvious” (CP 104: line 19), and
2. “it is the very obviousness of the risk her that negates the City’s liability” (CP 105; lines 23-24), and
3. “She had, in actuality, *already* noticed the broken and cracked sidewalks, on this particular walk, on this particular day, and *had realized* she needed to exercise additional caution in this area.” [Emphasis in original] CP 17.

D. NANCI MILLSON’S SUMMARY JUDGMENT MOTION

Nanci Millson sought a summary judgment order establishing fault on the part of Lynden, as a matter of law, on the basis that the undisputed facts establish that Lynden violated its duties to her, which violations caused her to fall and be injured. CP 21-71.

E. THE SIDEWALK LIFT

1. Did Lynden Have Notice of the Sidewalk Condition?

In its summary judgment pleadings, Lynden did not dispute that the sidewalk lift that caused Nanci’s fall was significant – 1.5 to 2

inches. CP 98-106, CP 17-20. The two photographs of the sidewalk lift attached as Exhibit B to the declaration of opposing counsel are helpful to an appreciation of extent of the lift at the time of Nanci's fall. CP 89-90.

Nanci Millson submitted a declaration by David Reich (CP 37-44), an arborist (CP 45-50), who inspected the scene of the accident and reviewed Lynden's records concerning the tree-planting in the area of the accident. CP 37-44. Reich's opinions, are that:

The lifted edge that caused Nanci Millson's accident had surpassed the height of $\frac{3}{4}$ " above grade ($\frac{1}{4}$ "- $\frac{1}{2}$ " is normally the hazard threshold) for at least three and a half years before her accident. It surpassed $\frac{1}{4}$ " as early as 2000.

* * *

Based on my education, experience, and investigation, I conclude that insidious, aggressive, lateral tree-root growth caused the sidewalk lift where Ms. Millson's fall occurred. The roots grew well beyond the confines of their original planting holes and grew enough annual wood close enough to the surface beneath the pavement to push the panels upward at a rate of about $\frac{1}{8}$ " to $\frac{1}{4}$ " annually, starting about 2001 or 2002.

Based on the estimated rate of root-growth/panel-lift I believe that the "trip-edge" lay exposed at 1"-1 $\frac{1}{4}$ " above grade for at least one and half years prior to Nanci Millson's [sic] accident. It lay exposed at $\frac{3}{4}$ "-1" above grade for at least two years before that. Based on those estimated time frames, that sidewalk panel's lifted edge existed high enough to cause an accident sometime in

late 2003 or early 2004 – three and a half to four years before Ms. Millson's trip and fall.

The City of Lynden approved sweetgums as street trees without regard to planting space and allowed the developer and the developer's contractors to plant them. Species information, design and planning data with respect to appropriate trees for ROW have existed for decades (Wagar and Barker 1983). A responsible, knowledgeable landscape professional would not have designed and planned public space, or specified and installed a species such as Sweetgum in such a small planting area. A knowledgeable site inspector would not have allowed it. A large species such as Sweetgum requires at least a nine-foot wide planting strip along with a diligent maintenance plan to execute upper-crown and root-pruning as needed-like Lynden's oaks on Front Street. Even that sidewalk shows disturbance in some sections and replacement in others. A large planting strip would permit a root-trap along the pavement edge (perhaps along the curb as well) and, with monitoring and maintenance, allow the tree to mature to its full size within the restrictions of a built environment.

CP 38, 50-51

In summary, Reich opines that an inspection of the area within three or four years before Nanci's fall would have provided actual notice to Lynden of the sidewalk lift. Reich also opines that Lynden improperly approved the planting of sweetgum trees in that area. CP 38, 50-51.

Lynden did not dispute Reich's findings or opinions, and cited Reich's findings in support of its motion. CP 17-20.

The trial court concluded that Lynden had notice of the dangerous sidewalk conditions:

14

11 It's pretty clear to me that Plaintiff has made a case
12 where if we for the moment do not consider the open and
13 obvious defense, if they made a case that there was poor
14 planning and construction, and perhaps not monitoring
15 enough, because it's clear from the evidence presented by
16 Plaintiff's expert that these cracks had been developing
17 for some time, and there had been quite a while that they
18 had been this height or a height which made them
19 dangerous, and the trees were inappropriate, and it's
20 endemic to this whole neighborhood that they have all
21 these problems, and the city would be on notice. I agree
22 with that.

RP 14:11-22.

2. Did Lynden Violate Sidewalk Safety Standards?

Nanci also submitted a declaration by Joellen Gill (CP 51-62), a human factors expert (CP 63-67), who reviewed the facts of this case, including the photographs of the sidewalk condition where Nanci fell at the time of her fall. Ms. Gill's opinions are that:

The condition of the subject sidewalk at the time of Ms. Millson's incident was in direct violation of basic safety principals, guidelines, and standards. For example, the American Society of Testing and Materials (ASTM) promulgated its standard ASTM F 1637-95, "Standard Practice for Safe Walking Surfaces" in 1995. It should be noted that the standard, as per Section 1.1, "Scope", puts forth minimum design, construction,

and maintenance standards for new and existing buildings and facilities (emphasis added).

Section 4.1.1 of ASTM F-1637-95 requires that walkways, including exterior sidewalks, shall be maintained flush and even to the extent possible. The maximum permissible deviations are set forth in Section 4.2 of the standard; these are the same as those set forth by the Americans with Disabilities Act (ADA). The maximum permissible vertical deviation is $\frac{1}{4}$ inch; deviations from $\frac{1}{4}$ to $\frac{1}{2}$ inch must be beveled at a slope of no greater than 2 horizontal to 1 vertical; deviations in excess of $\frac{1}{2}$ inch must be transitioned by a ramp as per the requirements of the Uniform Building Code (UBC) (i.e. not more than 3.8 degrees slope).

Section 4.7 of ASTM F-1637-95 is specifically dedicated to exterior walkways (i.e. sidewalks). Section 4.7.1 requires that "Exterior walkways shall be maintained so as to provide safe walking conditions." The standard then goes on to identify some of the factors that make an exterior walkway or sidewalk unsafe. For example, Section 4.7.1.2 notes that "Exterior walkway conditions that may be considered substandard and in need of repair include conditions in which the pavement is broken, depressed, raised, undermined, slippery, uneven, or cracked to the extent that pieces may be readily removed.". Section 4.7.2 specifically mandates that "Exterior walkways shall be repaired or replaced where there is an abrupt variation in elevation between surfaces. Vertical displacements in exterior walkways shall be transitioned in accordance with 4.2."

The general area of the concrete sidewalk where Ms. Millson tripped and fell was in a degraded and defective state. Ms. Millson tripped and fell when the toe of her swing foot caught the protruding vertical lip which was estimated to be 2 inches high at the time of her trip and fall. It is unequivocal that this vertical lip and/or defect in the concrete that induced Ms. Millson's trip and fall was in gross violation of the minimum safety requirements of ASTM F-1637-95 and created an

unreasonably dangerous risk of harm to pedestrians such as Ms. Millson.

* * *

The failure of the City of Lynden to take any corrective action such as grinding down or beveling the excessive protrusion, feathering the leading edge by filling with a patch, or at the very least, providing a warning such as marking with yellow paint as is customarily done until the hazard can be eliminated, was a violation of industry standards, basic risk management principals, and numerous safety guidelines and standards.

CP 56-57, 62

Lynden did not dispute Gill's opinions. CP 17-20.

3. Was The Risk Posed By the Sidewalk Lift Obvious or Known to Nanci Millson Before Her Fall?

First, Lynden asked the trial court to presume "that plaintiff herself could see the unevenness of the sidewalk and knew that tree roots were pushing up the joints of the sidewalk" CP 105-106. In support of that presumption Lynden referred to Nanci's description of the sidewalk condition on *Dogwood* Street (where she fell) as observed by her *after* her fall (CP 83-84), and on *Cherry* Street (where she observed sidewalks in poor condition and walked on the street), where she did *not* fall.

Second, Lynden asked the court to presume that what Nanci observed on Cherry Street – sidewalks in poor condition -- was the same

as what she observed on Dogwood Street (where she fell). Specifically, Lynden's argument is that "she had, in actuality, *already* noticed the broken and cracked sidewalks, on this particular walk, on this particular day, and *had realized* she needed to exercise additional caution in this area." [Emphasis in original] CP 17. The trial court's ruling incorporates that presumption:

14

23 The question though, I think, for the Court to answer
24 today is not so much that, but whether or not Ms. Millson
25 was aware of that or knew about that, not whether she

15

1 should have, but whether she was actually on notice to
2 that effect.
3 It's pretty clear from Plaintiff's expert that anybody
4 looking at it would have seen it and would have, should
5 have known it, and I think Ms. Millson in her own
6 testimony has indicated that she was aware that the
7 sidewalks were in bad shape in this neighborhood. It's a
8 slightly different street, I recognize that, but she also
9 has indicated in other places that it's almost every spot
10 where there are trees has got a raised sidewalk, and
11 that's kind of what she was saying.
12 I think it's pretty clear to me that throughout the
13 course of this walk, she was aware of this issue. She had
14 gone off of the sidewalk into the street at one point
15 because it was so bad. She had believed that this area
16 might be better, but the question isn't was she only, was
17 she just aware of this particular lift, but was she aware
18 of the general condition that this is a part of?
19 And this seems to me to be a part of a whole

20 neighborhood of these sidewalk problems of which she
was
21 aware, and she knew it was throughout the neighborhood,
22 and she mentioned that, herself.
23 Under those circumstances, as much as I think there
24 might be other issues if we could get to them that the
25 jury would want to be given an opportunity to decide and

16

1 should be given a chance to decide, my feeling in looking
2 carefully at Ms. Millson's testimony overall is that I
3 think she was sufficiently aware of this danger. She was
4 aware of it even just before the accident occurred, and
5 she admitted that she had been distracted and looked
6 elsewhere when she knew that she was in a situation and a
7 place in town where this was likely to happen because it
8 was dangerous.
9 So I think that the Court's ultimate conclusion has to
10 be that it was open and obvious, and that Ms. Millson
was
11 aware of the risks and the situation here; maybe not this
12 particular sidewalk joint but throughout the
neighborhood,
13 and she had avoided some of them. She was aware of
them
14 because she walked there regularly. I don't think that I
15 could find that somehow she didn't have that knowledge.

RP 14:22 - 16:15.

However, Nanci's deposition testimony was contrary to that presumption. On the day of her walk/fall, she noted sidewalks in very poor condition "in the south side of Greenfield Village", on *Cherry* Street (CP 81, 84), but when she got to *Dogwood* Street, where she fell, she observed that the sidewalk there was in better condition (CP 85: p.

62, lines 5-13), such that she was able to “pick up speed because the sidewalks, I thought, were better than where I had been” (CP 81: p. 31, lines 18-21).

The extent of Nanci’s awareness of sidewalk conditions on the streets she walked on the date of her accident is discussed by her in portions of her deposition that were not quoted by Lynden in its motion (CP 98-106):

1. The fall occurred in Greenfield Village (CP 80: p. 25, lines 19-20), which was a “safe neighborhood for walking”, and she had never tripped before while walking through Greenfield Village (CP 81: p. 29, lines 6-13); There were no similarly dangerous sidewalk areas anywhere else in the Greenfield Village area (CP 83: p. 40, line 24, through p. 41, line 2);
2. The directions she had walked in before the accident had no problem areas, including any major sidewalk cracks or lifts (CP 80: p. 28, lines 3-9);
3. She had only walked on Dogwood Street (where she fell) a couple of times before the fall (CP 80: p. 28, lines 23-25) – *and that had been a year or two earlier* (CP 85: p. 61, line 20, through p. 62, line 4). Furthermore, *she had never before walked in that direction* on the side of the street where her fall occurred. (CP 85: p. 61, lines 21-24);
4. She was walking along on the sidewalk on Dogwood Street when she saw some neighbors pull up in front of their house and was watching them when she fell (CP 81: p. 32, lines 14-19).

ARGUMENT

A. **FIRST ISSUE: the trial court exceeded its discretion by weighing the evidence presented by the parties and resolving material questions of fact in favor of Lynden**

1. **Summary Judgments, Generally**

Summary judgment pursuant to Civil Rule 56 is proper when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Civil Rule 56(c). A material fact is one upon which the outcome of the case depends, in whole or in part. *Morris v. McNichol*, 83 Wn.2d 491, 519 P.2d 7 (1974).

In *Beers v. Ross*, 137 Wn.App. 566, 570, 154 P.3d 277 (2007), the Court of Appeals discussed the issue of when summary judgments are proper, and how they are reviewed on appeal:

Washington law favors resolution of cases on their merits. *Smith v. Arnold*, 127 Wash.App. 98, 103, 110 P.3d 257 (2005). We review a trial court's summary judgment decision de novo. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." CR 56(c). In conducting our review, we weigh all facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party, the Beers. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990)); *Van Dinter v. City of*

Kennewick, 121 Wash.2d 38, 44, 846 P.2d 522 (1993); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

Here, on the day of her walk/fall, she noted sidewalks in very poor condition “in the south side of Greenfield Village”, on *Cherry Street* (CP 81, 84), but when she got to *Dogwood Street*, where she fell, she observed that the sidewalk there was in better condition (CP 85: p. 62, lines 5-13), such that she was able to “pick up speed because the sidewalks, I thought, were better than where I had been” (CP 81: p. 31, lines 18-21).

Nanci Millson submits that the trial court did not *weigh all facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party*. Instead, the trial court did the opposite: it determined that the sidewalk conditions observed by Nanci in areas on streets she walked *before* her fall were sufficient to establish that the sidewalk life which did cause her fall was “open and obvious”, such that Lynden owed no duty to Nanci. Had the trial court properly weighed the evidence, the court would have either (1) noted that Nanci had no legal obligation to watch her feet in an area where she did not expect to encounter dangerous sidewalk conditions, noted that there was substantial evidence to support negligence on Lynden’s part, and ruled

that the liability issues were properly for the jury to determine, or (2) would have noted that the undisputed facts were sufficient to support Nanci's – not Lynden's – summary judgment motion.

2. Summary Judgments In Sidewalk Cases Like This

A case involving similar facts and the same argument as Lynden is making is *Blasick v. City of Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954). There, Mrs. Blasick caught her heel and fell when she walked on a slight depression in the cross-walk of an alley. The depression was mostly less than one-half inch below the level of the surrounding area, and in only two places the depth was three-fourths of an inch – the maximum depth of the depression in any part of the cross-walk. There was no alley curb and the alley crosswalk was flush with the sidewalk on either side of the relevant portion of the alley.¹ In noting that “Appellant strenuously urges that the injured pedestrian 'was not looking where she was walking,' and that the 'depression was plainly visible, open, obvious and apparent’”, the Court, at 313-314, rejected that argument:

Appellant strenuously urges that the injured pedestrian 'was

¹ The Court defined a “spauled” area at page 311: “(‘Spauled’ is apparently a variant of ‘spalled,’ and in this instance means that the smooth surface of the concrete was gone, leaving an irregular depression of various depths and exposing the rocks and stones comprising the aggregate.)

not looking where she was walking,' and that the 'depression was plainly visible, open, obvious and apparent.'

Applicable to this case are our holdings that: (a) A pedestrian on a sidewalk who has no knowledge to the contrary may proceed on the assumption that the city has performed its full duty and has kept the sidewalk in a reasonably safe condition, *Kennedy v. City of Everett, supra*; *Clevenger v. City of Seattle*, 1947, 29 Wash.2d 167, 186 P.2d 87; (b) a pedestrian is not required to keep his eyes on the walk immediately in front of him at all times, *James v. Burchett*, 1942, 15 Wash.2d 119, 129 P.2d 790; *Clevenger v. City of Seattle, supra*; (c) the fact that there is something in a pedestrian's path which he could see if he looked and which he does not see because he does not look, does not constitute contributory negligence as a matter of law unless there is a duty to look for that particular thing, *Hines v. Neuner*, 1953, 42 Wash.2d 116, 253 P.2d 945.

These holdings, applied to the facts in this case, make it clear that whether a reasonably prudent and cautious pedestrian would have looked for a spauled area in the alley crosswalk was a question of fact for the jury, and that the pedestrian was not contributorily negligent as a matter of law. The case of *Hines v. Neuner, supra*, disposes of all the contentions made by the appellant on this phase of the case.

Nanci Millson submits that the trial court did not apply these legal principles to her case.

3. Liability of Cities In Sidewalk Cases

Cities are liable for defective conditions of which they have constructive or actual notice. *Nibarger v. City of Seattle*, 53 Wn.2d 228, 229, 332 P. 2d 463 (1958). The primary obligation to properly construct and maintain a sidewalk in a reasonably safe condition is on the city.

Berglund v. Spokane County, 4 Wn.2d 309, 313, 103 P.2d 355 (1940).

Where an offset exists on a city sidewalk of one inch or more, a jury question is presented as to whether or not the city exercised ordinary care in maintaining the sidewalks in a reasonably safe condition. *Smith v. City of Aberdeen*, 7 Wn.App 664, 665-667, 502 P.2d 1034 (1972).

See also *Blasick v. City of Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954) (depression or hole where woman's heel might have caught in a "spauled" area that ranged in depth from 1/4 inch to 3/4 inch); *Johnson v. City of Ilwaco*, 38 Wn.2d 408, 229 P.2d 878 (1951) (offset in sidewalk that ranged from zero inches to 1-1/4 inches).

4. Lynden's Duty To Nanci

WPI 140.01 sets forth Lynden's duties to those who its sidewalks:

WPI 140.01 Sidewalks, Streets, and Roads—Duty of Governmental Entity

The [county] [city] [town] [state] has a duty to exercise ordinary care in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to keep them in a reasonably safe condition for ordinary travel.

Our Supreme Court set out the instruction to be used in these cases in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002).

Cities in Washington have a duty to keep their sidewalks

"reasonably safe for use for those who use them in the exercise of ordinary care." The test for whether a defect renders a sidewalk unsafe is

whether a reasonably cautious man, having the duty to preserve and repair the sidewalks, would or would not consider a particular defect as one where pedestrians might be injured. Each case must rest upon its own facts and be determined accordingly.

Johnson v. Ilwaco, 38 Wn.2d 408, 414, 229 P. 2d 878 (1955).

The exact extent of the offset is not the only factor to be considered. The nature and character of the sidewalk, its location, the amount of travel over it by pedestrians, the extent to which the presence of the offset would ordinarily be seen or observed by travelers on the sidewalk, and many other conditions which might exist, all have to be taken into consideration. In those cases where reasonable minds can differ, the questions whether an offset in a sidewalk is of such a character that danger to a pedestrian from its existence may reasonably be foreseen and anticipated by the city, and whether in suffering it to remain the city had kept and maintained such sidewalk in a reasonably safe condition for ordinary use by pedestrians, are for the jury to determine.

Id. at 413.

In *Smith v. Aberdeen*, 7 Wn.App 664, 502 P. 2d 1034 (1972), the court held that evidence of a one inch high protuberance in a sidewalk was legally sufficient to support the jury's verdict that the city was negligent. Here, Lynden concedes that the rise in the sidewalk was 1.5 to 2 inches.

[A] pedestrian, who has no knowledge to the contrary, has the right to assume that the street upon which he is walking is free

from dangerous defects, and that he is not required to confine his attention constantly to the street ahead of him." "[A] pedestrian, who has no knowledge to the contrary, has the right to assume that the street upon which he is walking is free from dangerous defects, and that he is not required to confine his attention constantly to the street ahead of him.

Skaggs v. General Electric Co., 52 Wn.2d 787, 790, 328 P. 2d 871 (1958).

In *Fletcher v. City of Aberdeen*, 54 Wn.2d 174, 177, 338 P.2d 743 (1959) it was held that the duty of maintaining sidewalks is a *continuing* one.

5. Notice To Lynden Of The Dangerous Sidewalk

"Constructive notice to the city may be inferred from the elapse of time a dangerous condition is permitted to continue when it is long enough to be able to say that it ought to have known about the condition." *Nibarger, supra*, at 230. "What will constitute constructive notice will vary with time, place, and circumstance." *Albin v. National Bk. of Commerce*, 60 Wn.2d 745, 748, 375 P. 2d 487 (1962). "Failure to discover and remedy a dangerous defect in a public street within a reasonable time is itself negligence." *Sutton v. City of Snohomish*, 11 Wash. 24, 39 P. 273 (1895). In *Sutton*, the court held that the city had constructive notice when the plaintiff showed that a hole had existed in

the sidewalk for two months. The court in *Lorence v. City of Ellensburg*, 13 Wash. 341, 43 P. 20 (1895) held that the city had constructive notice when a hole existed for three to four months. The court in *Devenish v. City of Spokane*, 21 Wash. 77, 57 P. 340 (1899) held that the city had constructive notice when the jury found that a broken plank in the sidewalk had been there "one month or more." In *Shearer v. Town of Buckley*, 31 Wash. 370 (1903), the court found that the city had constructive notice of a hole in the street that had been there "some weeks before." In *Austin v. City of Bellingham*, 45 Wash. 460, 88 P. 834 (1907) the court held that the city had constructive notice when a defect in a sidewalk had existed for "about two months." In *Apker v. City of Hoquiam*, 51 Wash. 567, 99 P. 746 (1909), the city was held to have constructive notice when a pile of gravel had been in the street for thirty days. And in *Holland v. Auburn*, 161 Wash 594, 297 Pac. 769 (1931), the city was held to have had constructive notice when ice had been on the sidewalk for six or seven days.

Here, the expert testimony of David Reich (CP 37-44) establishes that given the height of the sidewalk lift, the sidewalk condition reached a hazardous height at least **3.5 years** before Plaintiff's fall – which as the above cited case demonstrates, easily establishes that

Lynden had constructive notice of the defect. CP 41.

Thus, under well established law, Lynden had a duty to keep its sidewalks in a safe condition. Lynden has not disputed that it was responsible for the planting of trees in the area of the sidewalk condition of a type that were known to cause sidewalk lifts. Furthermore, Lynden had constructive notice of the sidewalk rise where the accident occurred, given the time it took the lift to reach 1.5 to 2 inches, and consequently had a duty to repair that sidewalk – a failure that led directly to Plaintiff's injuries.

B. SECOND ISSUE: the trial court committed error by failing to grant Nanci Millson's summary judgment motion where the undisputed facts established that Lynden violated its duty to Nanci and there was mere speculation regarding negligence on the part of Nanci Millson to negate that duty

1. Lynden's "Open And Obvious" Argument

LYNDEN argues that "there is no liability for a City for 'open, obvious' and inherent dangers like a sidewalk panel that has raised up over time. CP 102: lines 7-8. However, there is no factual nor legal support for this argument. The only case cited by Lynden in support of its argument (CP 105: lines 9-19) is *Howard v. Horn*, 61 Wn.App. 520, 810 P.2d 1387 (1991), which is distinguishable: *Howard* involved a discussion of a landlord's duties to a tenant where non-safety glass was a

“latent” defect, and “uneven cement and lack of a handrail were patent defects”. (*Id.*, at 524) *Howard* doesn’t address a municipality’s duties to users of its sidewalks, and the uneven cement and lack of a handrail in *Howard* were patent defects because the tenant had seen these problems on numerous occasions.

2. The Sidewalk Lift Was Not “Open” or “Obvious” to Nanci Millson, Who Was Not Required to Keep Her Eyes Riveted to the Sidewalk

Lynden’s argument that it is not liable to Nanci Millson because she “tripped over an open and obvious sidewalk crack while admittedly distracted from paying attention to where she was walking” (CP 98: lines 19-21) is contrary to Washington law. In *Meissner v. City of Seattle*, 14 Wn. App. 457, 459, 542 P.2d 795 (1975), the Court of Appeals affirmed a jury instruction stating:

You are instructed that where there is no reason to anticipate a hazard, reasonable care does not require one who is walking in a place provided for the purpose to keep his eyes riveted to the floor immediately in front of his feet.

Likewise, in *Todd v. Harr, Inc.*, 69 Wn.2d 166, 417 P.2d 945 (1966), the Supreme Court affirmed a jury instruction stating:

...where there is no reason to anticipate danger, reasonable care does not require one who is walking in the place provided for that purpose, to keep her eyes fixed on the floor immediately in front of her feet.

For more than 70 years, it has been the law in Washington that “a pedestrian on a sidewalk, who has no knowledge to the contrary, may proceed on the assumption that the city has performed its full duty [to provide a reasonably safe sidewalk]”. *Kennedy v. Everett*, 2 Wn.2d 650, 654, 99 P.2d 614 (1940). Here, while it is true that on the day of Nanci’s fall, she noted sidewalks in very poor condition “in the south side of Greenfield Village”, on *Cherry Street* (CP 81, 84), she noted that the sidewalk on *Dogwood Street*, where she fell, was in better condition (CP 85: p. 62, lines 5-13), such that she was able to “pick up speed because the sidewalks, I thought, were better than where I had been” (CP 81: p. 31, lines 18-21).

In *Clevenger v. The City of Seattle*, 29 Wn.2d 167, 169-172 (1947), the Supreme Court disapproved the argument Lynden is urging here:

In reversing such ruling, we said:

It is not the duty of the pedestrian on a sidewalk to bear constantly in mind dangers which may best him by reason of an imperfect walk. If the rule contended for by the respondent should be enforced, one would not dare to turn his head to the right or to the left in traveling a street, but he would be compelled to constantly notice the sidewalk in front of him. Some people are naturally alert and observant of material things, notice everything that is in sight; not necessarily as a matter of caution or

prudence, but frequently from curiosity. Others are more meditative as they move around, abstracted in thought, unobservant of their material surroundings, and absorbed frequently in the contemplation of business, pleasure, or mental problems of various kinds. The great majority of people are, at least at times, so abstracted; and shall we say that only the most alert and observant are to be protected from pitfalls on a public highway? Not so. The great rank and file of thoughtful, contemplative people have a right to rely upon the duty of the city authorities to keep the sidewalks upon which they are invited to travel in a safe condition for travel, and the burden of mental strain and watching to avoid pitfalls where no pitfalls should be is not imposed upon them by the law, at least to such an extent that they are to be deprived of the right of submitting the reasonableness of their actions to the consideration of a jury of their peers. One has a right to travel upon the street on the darkest night without a lantern, relying upon the performance of their duties by the authorities in keeping the streets in a suitable condition for travel. . . .

In *Kelly v. Spokane*, 83 Wash. 55, 145 P. 57, 58, we held:

The second point urged is that the respondent was guilty of contributory negligence which was the proximate cause of the injury. It is the duty of a city to use reasonable care to maintain its streets and sidewalks in reasonably safe condition for travel. The traveler who has no knowledge to the contrary may proceed upon the assumption that the city has fulfilled its duty.

Momentary diversion of the attention of the pedestrian does not as a matter of law constitute contributory negligence. *Mischke v. Seattle*, 26 Wash. 616, 67 P. 357. [Emphasis added]

In *Kennedy v. Everett*, 2 Wash.2d 650, 99 P.2d 614, 616, we said:

The next question is whether the respondent was guilty of contributory negligence. In the meeting of the two ladies, his attention was diverted for an instant, and this was when he stepped into the hole. **A pedestrian on the sidewalk, who has no knowledge to the contrary, may proceed on the assumption that the city has performed its full duty. Momentary distraction of the attention of the pedestrian does not, as a matter of law, constitute contributory negligence.** *Mischke v. Seattle*, 26 Wash. 616, 67 P. 357, *Kelly v. Spokane*, 83 Wash. 55, 145 P. 57. We conclude that, under the rule just stated, the respondent was not guilty of contributory negligence as a matter of law. [Emphasis added]

See also, *James v. Burchett*, 15 Wash.2d 119, 129 P.2d 790.

The *Clevenger* Court's approval of the latter passage from *Kennedy v. Everett* is dispositive of an allegation of *contributory (comparative) negligence* in this case, as well.

3. Public Policy Considerations

Nanci Millson submits that considerations of *public policy* are also important, here. The reason that a municipality has any duty to those who use its streets and sidewalks is because of a concern for *public safety*. In *Howard v. Horn*, 61 Wn.App. 520, 523, 810 P.2d 1387 (1991) the court mentions the need to evaluate public policy considerations in deciding questions of duty:

Whether a duty exists is initially a question of law. In deciding questions of duty, a court must evaluate public policy considerations. *Swanson v. McKain*, 59 Wash.App. 303, 307,

796 P.2d 1291 (1990), review denied, 116 Wash.2d 1007, 805 P.2d 813 (1991).

Here, Lynden asks for immunity from its violations of duties to the users of its sidewalks for a reason that would eliminate any duty at all: because its sidewalks are so dangerous that they present “open and obvious” conditions, regarding which they have no duty to those who use those sidewalks.

CONCLUSION

Harm was caused to Nanci Millson because Lynden permitted trees to be planted near a sidewalk where the City knew or reasonably should have known that the tree’s roots would eventually cause a sidewalk lift that would endanger members of the public who used the sidewalk. Thereafter, for a period of years, Lynden failed to inspect the sidewalk and fix the sidewalk lift that caused Nanci’s accident – indeed, Lynden failed to show that it conducted *any* inspections of its sidewalks, instead relying solely on receipt of complaints about sidewalk conditions. Furthermore, Lynden admits that the sidewalk lift of 1.5 to 2 inches was “open and obvious”. The law does not allow a municipality to simply sit back and wait for injury to occur before it acts to repair a dangerous condition.

Lynden's motion for summary judgment should be denied, and Nanci's motion for partial summary judgment re liability against Lynden should be granted.

DATED this 17th day of April, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard C. Platte". The signature is fluid and cursive, with a prominent initial "R".

Richard C. Platte, WSBA #4757
Attorney for Plaintiff/Appellant Nanci Millson

1 Smith (counsel of record for City of Lynden), whose address is shown below, on the date
2 set forth below.

3 Eric E. Roy
4 Jill Smith
5 Roy, Simmons & Parsons
6 Attorneys at Law
7 1223 Commercial Street
8 Bellingham, WA 98225

7 Alan E. Garrett
8 Law Offices of Kelley J. Sweeney
9 1191 Second Ave., Suite 500
10 Seattle, WA 98101

11 

12 RICHARD C. PLATTE, WSBA 4757
13 DATED: this 18th day of April, 2012,
14 at Bellingham, Washington