

67931-7

67931-7

NO. 67931-7

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2012 MAY -4 AM 11:50

---

NANCY MILLSON, Appellant;

v.

CITY OF LYNDEN, TIM & HELEN NEWCOMB,

Respondents.

---

**BRIEF OF RESPONDENT CITY OF LYNDEN**

---

JILL SMITH, WSBA #30645  
ERIC E. ROY, WSBA #21138  
Attorneys for Defendant City of Lynden

ROY, SIMMONS, SMITH & PARSONS, P.S.  
1223 Commercial Street  
Bellingham, WA 98225  
(360) 752-2000

ORIGINAL

TABLE OF CONTENTS

Introduction . . . . .1

Statement of the Case.....2

    A. Nature of the Proceeding.....2

    B. Standard of Review.....3

    C. Statement of Facts.....4

Argument.....8

    A. The “General Rule” about Sidewalks.....8

    B. A City’s Duty to Warn or Repair.....10

    C. Plaintiff’s actual knowledge takes her outside the “general rule,” and removes the City’s duty to warn or repair. ....13

Conclusion.....15

**TABLE OF AUTHORITIES**

**CASES**

*Bailey v. Safeway Stores, Inc.*,  
55 Wash.2d 728, 349 P.2d 1077 (1960) .....12

*Barker v. Skagit Speedway, Inc.*,  
119 Wn. App. 807, 82 P.3d 244 (2003) .....11

*Dolan v. King County*,  
172 Wash.2d 299, 258 P.3d 20 (2011).....4

*Ford v. Red Lion Inns*,  
67 Wn. App. 766, 770, 840 P.2d 198 (1992).....10

*Hoffstatter v. City of Seattle*,  
105 Wn.App. 596, 600, 20 P.3d 1003 (2001) .....9

*Howard v. Horn*,  
61 Wn. App. 520, 810 P2d 1387 (1991).....12

*Johnson v. Ilwaco*,  
38 Wn.2d 408, 414, 229 P.2d 878 (1955).....3 (FN1), 9

*Jones v. Allstate Ins. Co.*,  
146 Wash.2d 291, 300, 45 P.3d 1068 (2002).....3

*Keller v. Spokane*,  
146 Wn.2d 237, 249, 44 P.3d 845 (2002).....9

*Kennedy v. City of Everett*,  
2 Wash.2d 650, 99 P.2d 614 (1940).....9

*Leonard v. Pay'n Save Drug Stores, Inc.*,  
75 Wash.App. 445, 880 P.2d 61 (1994) .....10

<i>Lewis v. City of Spokane</i> , 124 Wash. 684, 215 P. 36 (1923).....	9, 10, 13
<i>In re Marriage of Rideout</i> , 150 Wash.2d 337, 351, 77 P.3d 1174 (2003).....	4
<i>McMann v. Benton County, Angeles Park Communities, Ltd.</i> , 88 Wn. App. 737, 946 P2d 1183 (1997) .....	10
<i>Mele v. Turner</i> , 106 Wash.2d 73, 80, 720 P.2d 787 (1986) .....	12
<i>Seiber v. Poulsbo Marine Center, Inc.</i> , 136 Wash.App. 731, 150 P.3d 633 (2007) .....	10, 12
<i>Skaggs v. General Electric Co.</i> , 52 Wn. 2d 787 (1958) .....	2

OTHER AUTHORITIES

Restatement (Second) of Torts §§ 343 and 343A (1965) .....	10, 11
W. Prosser, Torts § 61 (3d ed. 1964).....	12

## **Introduction**

This is a personal injury case, in which plaintiff tripped over a raised sidewalk panel in the Greenfield Village neighborhood in the City of Lynden (hereinafter, the “City”). The trial court carefully reviewed plaintiff Millson’s admissions, in her deposition testimony, and found that plaintiff Millson had *actual notice* of the prevalence of raised sidewalk joints in Greenfield Village. The court determined that, “it was open and obvious and Ms. Millson was aware of the risks.” (RP 16). The court, therefore, correctly concluded that the City did not owe this particular plaintiff a duty to warn or repair, and granted summary judgment on plaintiff’s claims.

Plaintiff Millson routinely walked in Greenfield Village for exercise. She testified that more than half of the sidewalk joints in her neighborhood were raised or cracked. In fact, one street in the subdivision was so bad that she chose to walk in the street, because “the sidewalks there were so horrible” and “were all broken up and raised up.” Her own expert confirmed that “28 out of 50” sidewalk joints had “serious concrete paving disruptions very similar to the section that caused Ms. Millson’s accident.” In fact, plaintiff’s counsel admitted in his Response on Summary Judgment that, “no one living in the area or periodically inspecting the area could have failed to see the sidewalk lift of many occasions.”

On this July afternoon, plaintiff had been walking carefully, precisely because she was aware of the sidewalk lift, but then she became distracted and tripped over a crack exactly like the others that she had seen and avoided. Plaintiff agreed that the crack, upon which she tripped, was “obvious.”

The court was correct to treat plaintiff’s own sworn testimony as binding upon her, and to conclude that plaintiff had actual notice of the danger. Plaintiff does not fit within the “generic” rule—that “a pedestrian *who has no knowledge to the contrary* has the right to assume that the street \* \* is free from defects.” *See, e.g., Skaggs v. General Electric Co.*, 52 Wn. 2d 787 (1958). Instead, plaintiff had actual knowledge that the sidewalk was not free from defects—but instead was raised up at nearly every joint that was near a tree. Plaintiff was not owed a duty to warn; and, accordingly, her appeal of summary judgment should be dismissed.

## **Statement of the Case**

### **A. Nature of the Proceeding**

This is an appeal, by plaintiff, of an Order Granting Summary Judgment. The trial court granted Summary Judgment to the City of Lynden, finding that the City did not have a duty to warn this particular plaintiff of a raised sidewalk joint, because she had actual notice of the danger.<sup>1</sup> CP 12

---

1 The City concedes that under established case law, most sidewalk trip-and-fall cases

(Order Granting Summary Judgment, 10/28/11).

The trial court stated, “My feeling in looking carefully at Ms. Millson’s testimony overall is that I think she was sufficiently aware of this danger. She was aware of it even just before the accident occurred, and she admitted that she had been distracted and looked elsewhere when she knew that she was in a situation and a place in town where this was likely to happen because it was dangerous.” (RP 16:1-8). Therefore, the court held, “the Court’s ultimate conclusion has to be that it was open and obvious, and that Ms. Millson was aware of the risks and the situation here; maybe not this particular sidewalk joint, but throughout the neighborhood, and she had avoided some of them. She was aware of them because she walked there regularly. I don’t think I could find that somehow she didn’t have that knowledge.” (RP 16:9-15).

**B. Standard of Review**

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). However,

---

will involve a jury question, as to whether the sidewalk was in an unsafe condition, because in most cases, the plaintiff was unaware of the sidewalk flaw. *See, e.g., Johnson v. Ilwaco*, 38 Wn.2d 408, 414, 229 P.2d 878 (1955). The reason this is *not* such a case is the trial court’s finding of plaintiff’s actual knowledge of the sidewalk’s condition, coupled with plaintiff’s admission that she realized extra caution was due, as a result, but had lapsed in her attentiveness when she was distracted by seeing a friend.

where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate. *In re Marriage of Rideout*, 150 Wash.2d 337, 351, 77 P.3d 1174 (2003).

Here, where the trial court made a finding of “actual knowledge” on the part of plaintiff Millson, that finding is entitled to deference by this court. *See Dolan v. King County*, 172 Wash.2d 299, 258 P.3d 20 (2011); *Rideout*, *supra* at 351.

### **C. Statement of Facts**

Nanci Millson is a 57-year-old hairdresser, who lives in Lynden. (CP 79-80). She lives on Oak Street in the Greenfield Village subdivision. (CP 79-80). Her home is just one block away from the location where she suffered a trip-and-fall injury in 2007. (CP 80).

On July 2, 2007, Millson went for a walk, for exercise. (CP 80). She had been walking for exercise two to four times a week, for at least two years prior to 2007. (CP 80). She usually walked about a mile, on varied routes, and had walked on Dogwood Street (where this fall occurred) a few times before. (CP 80). On previous occasions, *Millson had noticed* that, throughout Greenfield Village, there were *multiple places* where the sidewalks had cracked and lifted. (CP 80). In fact, on the day of this fall, Millson had been “so careful before that, \* \* \* over in the south side of Greenfield Village,” because “the sidewalks there were so horrible. \* \* \* They were all broken up

and raised up I was walking—I had to walk in the street at the end.” (CP 81). (Her Response on Summary Judgment contends that “no one living in the area \* \* \* could have failed to see the sidewalk lift on many occasions.”) (CP 24).

As she got onto Dogwood Street, Millson was “walking along and saw some neighbors that live across [her] alley pull up in front of their house, and [the female neighbor] got out and went in the house, so [Millson] was watching them. And next thing [Millson] knew, she was on the ground.” (CP 81).

Plaintiff Millson has further testified:

Q. So what you were doing is you were walking and you were looking at Kyle and Shelley?

A. I glanced that way, yes.

Q. And during the glance is when you tripped over the sidewalk rise?

A. I can't say it was precisely at that second. I may have looked straight ahead. I was watching where I was going, too.

Q. But in any event, you were not looking at the sidewalk when you tripped?

A. Correct.

Q. Typically, when you would walk through Greenfield Village, you would pay attention to the sidewalks?

A. Yes.

Q. But on this particular occasion, you got distracted by seeing Kyle and Shelley?

A. Yes.

\* \* \*

Q. As you were approaching the sidewalk rise, was there anything that was obstructing your view of the rise, like shrubs or trees or a turn in the sidewalk or anything like that?

A. No.

Q. Do you think that if you had not been distracted by Kyle and Shelley

you would have seen this sidewalk rise and stepped over it?

A. I have no idea.

\* \* \*

**Q. Would you agree that this is an obvious sidewalk rise?**

A. Yes.

(CP 82, 84). Plaintiff was asked:

Q. So in your times walking in Greenfield village before the fall, you never noticed any major sidewalk cracks or lifts?

A. Well, they weren't major. They were probably a half inch or so.

Q. And **were they all over the place, these half-inch lifts?**

A. **Uh-huh, in different areas.**

(CP 80).

In describing her walk on July 2, 2007, plaintiff admits that she was "being so careful" before getting to Dogwood Street. She was asked:

Q. Why were you being so careful there?

A. The sidewalks were so horrible.

Q. What was so horrible about them?

A. **They were all broken up and raised up. I was walking—I had to walk in the street at the end.**

(CP 81). She also testified:

Q. And would you say that this area is Dogwood Avenue – Dogwood Street

A: Dogwood Street.

Q: -- was in better condition than Cherry Street?

A. I think so.

\* \* \*

Q. But you were well aware that you needed to look out where you were going regardless?

A. Yes. I always watch where I'm going, except for that split second.

(CP 85). She agrees that the area where she fell is depicted accurately in photos in the record. (CP 83, 89-90).

Later, plaintiff Millson was asked about the sidewalk cracks throughout the neighborhood:

Q. Do you know what caused the sidewalk to raise up?

A. The roots of the tree.

Q. And how do you know that?

A. Because it's every spot, almost, on the street in the neighborhood where there's a tree, has got raised spots. Very -- a lot of them. Not every one, but...

(CP 85). On this particular day, Millson was wearing tennis shoes. She was alone. (CP 81). She had nothing in her hands and was not listening to anything or carrying anything, except to have her cell phone in her front pocket. (CP 87.) She visited the site the next day and determined that the sidewalk had raised up "one and a half to two inches," and that the rise was "obvious." (CP 84).

Despite having noticed that the sidewalks were "so horrible" in the Cherry Street area, Millson had never reported that problem to the City. (CP 81). She also did not report the sidewalk situation on Dogwood Street, until several months after she was injured, because she wanted "to see who was going to do what about it." (CP 83). Once notified, the City immediately responded, marked the area with white paint, put barricades over the crack, and, ultimately, removed the tree nearest the crack, replaced that section of sidewalk, and "shaved off" other similar areas in the neighborhood. (CP 84).

Then, after plaintiff initiated litigation with the City, she hired an arborist, David Reich. He conducted multiple site visits to Greenfield

Village. (CP 37). After one of his visits, he said:

I randomly counted fifty street trees in the Millson's neighborhood, all uniformly planted in uniformly constructed planting strips between uniform sidewalks, curbs and streets. Of those fifty tree locations, 28 revealed serious concrete paving disruption very similar to the pavement section that caused Ms. Millson's accident and injury.

(CP 39). In fact, Reich went on to say:

[Sidewalk] *panels adjacent to many street trees* in the Greenfields housing subdivision have lifted well above established surface grade. At most of those sites, entire sidewalk panels lifted in whole units at the seams or expansion joints, as opposed to breaking and lifting at some point between joints.

(CP 39). Mr. Reich also noted:

No heaved or lifted pavement that I saw, occurs anywhere else along the Greenfields public sidewalks other than at the panels directly adjacent to the trees.

(CP 40). In other words, the fact of sidewalk joint heaving is wide-spread in Greenfield Village, and occurs in a predictable pattern—near the street trees. (CP 38-40). This is consistent with plaintiff's testimony that, "every spot, almost, on the street in the neighborhood where there's a tree, has got raised spots. Very—a lot of them." (CP 85).

## **Argument**

### **A. The "General Rule" about Sidewalks**

Appellant spends ten pages (p. 16-26) in her Opening Brief discussing

the “general rules” of a City’s duty to maintain its sidewalks in a reasonably safe condition for pedestrians. The City has no disagreement with the general case law set forth in the Opening Brief. A municipality owes a duty of ordinary care to all persons to maintain public sidewalks in a condition that is reasonably safe for pedestrians. *Keller v. Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002); *Hoffstatter v. City of Seattle*, 105 Wn.App. 596, 600, 20 P.3d 1003 (2001). It is not an insurer of pedestrian safety. *Kennedy v. City of Everett*, 2 Wash.2d 650, 99 P.2d 614 (1940).

The City adds the following:

‘It is hardly necessary to say that a city is not an insurer of the personal safety of everyone who uses its public walks. Its duty is performed when it keeps them reasonably safe for use for those who use them in the exercise of ordinary care. \* \* \* A test which is sometimes applied to determine whether a city has performed its duty 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. City of Ilwaco*, 38 Wash.2d 408, 229 P.2d 878 (1951). And, “while a city must use all reasonable care in keeping its sidewalks reasonably safe for travel, it is not an insurer.” *Lewis v. City of Spokane*, 124 Wash. 684, 215 P. 36 (1923). “Sidewalks are not, and municipalities are not required to have them, perfect.” *Id.*

In making the determination of whether the City had a duty, and breached it, the following factors have been set forth:

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 its presence 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.

*Lewis*, 125 Wash. at 413.

**B. A City's Duty to Warn or Repair**

The City has no duty to warn of conditions which are open and obvious to the user. *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wash.App. 731, 150 P.3d 633 (2007) (“Where an alleged dangerous condition is both obvious and known to a plaintiff, the defendants owe no duty to warn of this condition.”) To decide a premises liability case like this one, this court should rely on the legal standard found in Restatement Second of Torts § 343. See, e.g., *Ford v. Red Lion Inns*, 67 Wn. App. 766, 770, 840 P.2d 198 (1992) (setting forth Restatement (Second) of Torts §§ 343 and 343A (1965) as the appropriate test for determining landowner liability to invitees); *McMann v. Benton County, Angeles Park Communities, Ltd.*, 88 Wn. App. 737, 946 P2d 1183 (1997) (applying Restatement rule); *Leonard v. Pay'n Save Drug Stores, Inc.*, 75 Wash.App. 445, 880 P.2d 61 (1994).

The Restatement provides:

A possessor of land is subject to liability for physical harm caused to his [or her] invitees by a condition on the land if, but only if, he [or she]

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

c) fails to exercise reasonable care to protect them against the danger. Restatement (Second) of Torts §343 (1965).

Under the Restatement test, too, the duty to repair or warn does not exist if the condition is open and obvious, and/or the plaintiff has actual knowledge of the condition.

Courts have consistently refused to impose a duty to warn of conditions which either are (a) dangerous only in an unforeseeable way, or (b) obviously dangerous. In *Barker v. Skagit Speedway, Inc.*, 119 Wn. App. 807, 82 P.3d 244 (2003), the plaintiff was a visitor to the pit area of the raceway. While he was there, his foot was run over by a slow-moving car being towed out of the area. The plaintiff alleged premises liability against the raceway owner based on a failure to warn. The court disagreed. In rejecting that claim, the court held that “there is no liability for harm from conditions for which no unreasonable risk is to be anticipated.” In other words, the court would only impose liability for failing to warn of risks that

were reasonably foreseeable, and having one's foot run over by a slow-moving, towed race car was not a reasonably foreseeable risk.

In *Howard v. Horn*, 61 Wn. App. 520, 810 P.2d 1387 (1991), a landlord maintained an apartment complex that had very uneven concrete in the common area/entrance. The tenant fell on the uneven concrete and was injured in the fall. Even though the tenant experienced the very injury that was foreseeable from the uneven concrete, the court held that the landlord did not have liability, in part because the uneven concrete was "clearly visible." Thus, the landowner could reasonably expect that the tenant would take due precautions not to fall on such an obviously uneven strip of concrete. See also W. Prosser, *Torts* § 61 (3d ed. 1964) ("Even to an invitee there is no duty to warn of dangers known to him or which are so apparent that he may reasonable be expected to discover them.")

Even more closely related to this case, summary judgment is appropriate, when the danger *presented by a sidewalk is open and obvious*. See, e.g., *Seiber*, 136 Wash.App. at 731. In *Seiber*, the court stated:

Where an alleged dangerous condition is both obvious and known to a plaintiff, the defendants owe no duty to warn of this condition. See *Mele v. Turner*, 106 Wash.2d 73, 80, 720 P.2d 787 (1986) (owner of lawnmower did not owe a duty to warn that placing one's hand near the spinning blade was dangerous).

This is not a "new" or "isolated" holding, either—see, e.g., *Bailey v. Safeway Stores, Inc.*, 55 Wash.2d 728, 349 P.2d 1077 (1960) ("The appellant

cannot rely on respondents' failure to place barriers or warning signs at the point in question. The conditions being apparent and known to her there was no necessity for signs or barriers. Their only object is to give notice of a dangerous situation.”)

**C. Plaintiff’s actual knowledge takes her outside of the “general rule,” and removes the City’s duty to warn or repair.**

Here, the trial court found that this particular plaintiff had “actual knowledge” of the condition of the sidewalk. The trial court referenced the following facts, taken from plaintiff’s own deposition transcript:

1. This plaintiff walked this neighborhood regularly. (CP 80, RP 15).
2. She “was aware that the sidewalks were in bad shape in this neighborhood.” (CP 28, RP 15).
3. This plaintiff knew that “almost every spot where there are trees has got a raised sidewalk.” (CP 85, RP 15).
4. This plaintiff had actually chosen to walk in the street earlier that day, because of this issue. (CP 81, RP 15).
5. This was a part of a whole neighborhood of these sidewalk problems of which she was aware. (CP 15).

Under *Lewis*, “the extent to which [the defect’s] presence would ordinarily be seen or observed,” is one of the factors that are legitimately taken into account, in deciding whether a City has a duty to repair or warn. Another factor is whether the user was “using the sidewalk *in the exercise of ordinary care.*” *Id.* Here, plaintiff’s actual knowledge of the sidewalk lift problem is relevant to both inquiries. It shows both that (a) the defect *could*

ordinarily be seen or observed; and (b) the user (Millson) had been using the sidewalk in the exercise of ordinary care, but allowed that care to lapse when she became distracted by a neighbor.

There can be no dispute that plaintiff Millson was aware of a “sidewalk” issue, during her walk on July 2, 2007. She admits that she had been “being so careful” before she got to this area, and also admits that, “typically, when [she] walked through Greenfield Village, [she] would pay attention to the sidewalks,” but that “on this particular occasion, [she] got distracted by seeing Kyle and Shelley,” her neighbors. (CP 82). She has “no idea” whether she would have seen this sidewalk rise, if she had not been distracted by Kyle and Shelley. (CP 84). But, it was open and obvious. See photos (CP 89-90).

Under such facts, plaintiff cannot claim the “privilege” that other pedestrians may be afforded—to walk blindly and assume that they will not encounter hazards. *She knew* that roots were lifting up sidewalks in this area, and she took due care, until she became distracted. This is not a situation where the City had a duty to warn—the danger was open and obvious, and plaintiff had actual knowledge of it.

## Conclusion

The trial court properly granted summary judgment in this case, because of the plaintiff's admission that she had actual knowledge of the raised sidewalk joint problem throughout Greenfield Village, knew that additional care was required, and only fell when she became distracted.

DATED this 3 day of May, 2012.

Respectfully submitted,



JILL SMITH, WSBA #30645  
Attorneys for Respondent, City of Lynden

ROY, SIMMONS, SMITH & PARSONS, P.S.  
1223 Commercial Street  
Bellingham, WA 98225  
(360) 752-2000  
FAX: (360) 752-2771

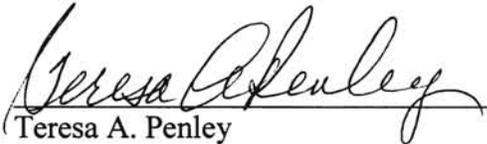
## CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below I served via email and U.S. Mail, First Class postage prepaid, a full and correct copy of the foregoing BRIEF OF RESPONDENT CIYY OF LYNDEN on the following parties at the following addresses:

Richard Platte  
Attorney at Law  
336 36<sup>th</sup> Street, #387  
Bellingham, WA 98225  
**and via Email: [rcplatte@msn.com](mailto:rcplatte@msn.com)**

Alan E. Garrett  
Law Offices of Kelley J. Sweeney  
1191 Second Avenue, Suite 500  
Seattle, WA 98101  
**and via Email: [alan.garrett@libertymutual.com](mailto:alan.garrett@libertymutual.com)**

DATED this 3<sup>rd</sup> day of May, 2012.

  
Teresa A. Penley