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No. 68706-9-I

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JERMAINE DOSS,

*Plaintiff/Appellant,*

vs.

CITY OF SEATTLE WASHINGTON, a GOVERNMENTAL ENTITY,

*Defendant/Respondent,*

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

Jermaine Doss tripped and fell on a street in Seattle on September 28, 2007, but cannot say exactly where or how the accident occurred. He has asserted, variously, that he tripped on a sidewalk defect, on a tree root in a planting strip, and between the planting strip and the curb. Summary judgment was properly granted because there is no evidence that the City of Seattle had notice of a dangerous condition of the sidewalk, that any such condition actually existed, or that the planting strip was unreasonably dangerous. The trial court's dismissal of this action should be affirmed.

## **II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR**

Appellant's Assignment of Error No. 1 reads:

The trial court erred in granting summary judgment in a case where a genuine issue of material fact exists as to whether plaintiff tripped on a sidewalk where roots from a tree were planted and maintained by defendant.

This statement is ambiguous because while it refers to an accident on a sidewalk, appellant's statement of the issues pertaining to this assignment appears to say that there is a question of fact as to whether Mr. Doss's accident occurred between a planting strip and the curb, on a sidewalk in front of the café opposite the planting strip, or on the planting strip itself. (Issue No. 1.)

Moreover, Issue No. 2 is ambiguous because it begins with “If so,” without stating which of the preceding alternatives is assumed to be so.

Appellant’s Assignment of Error No. 2 is:

The trial court erred when it found that there was no negligence on the part of the defendant, City of Seattle.

There is no statement of issues pertaining to this assignment of error.

Reading the assignments of error and statement of the issues together, the City interprets the basis of this appeal to be that the trial court erred in granting summary judgment because there is a question of fact as to whether Mr. Doss tripped on the sidewalk, on the planting strip, or between the planting strip and the curb, but that under any of these scenarios, the City’s negligence caused the accident.<sup>1</sup>

### **III. STATEMENT OF THE CASE**

Jermaine Doss sued the City of Seattle on October 27, 2010, alleging that he “was thrown to the ground by a hazard” in the sidewalk on the 200 block of Blanchard Street. CP 1-7. The complaint alleged negligence on the part of the City, in that the City failed to correct an

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<sup>1</sup> Appellant’s failure to articulate assignments of error and issues pertaining to those assignments is violative of RAP 10.3(a)(4).

unsafe condition on the sidewalk. CP 4. The complaint also alleged that the City created a hazard by the negligent design, construction, and maintenance of “planting spaces” in the sidewalk. CP 4. It further alleged that “as a result of the negligence of the defendant as set forth herein the defendant caused the plaintiff to fall and as result suffer injuries to his body...” CP 5.

When shown a photograph of the sidewalk in question during his deposition, CP 75<sup>2</sup>, Mr. Doss was unable to identify the location of his accident. He testified as follows:

Q. Can you indicate on the sidewalk where it was that you were walking just before you tripped?

...

So you've drawn two lines and an arrow. And it looks like you intended -- the arrow means to suggest that both of these lines were going in the same direction as the arrow; is that correct?

A. Yes, sir.

....

Q. Which of these two lines that you drew indicates the path you were taking just before your accident?

A. I was somewhere in between that path. That's what I was doing. That's what I was directing to you.

...

Q. What was it that you tripped on?

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<sup>2</sup> A color copy of this photograph is attached in the Appendix.

A. If you had -- it's kind of like you're looking at -- I'm not -- I'm not a -- I'm not a -- I'm not a maintenance -- I'm not an engineer. But within somewhere on that sidewalk, I -- I -- my feet was caught. I had on some tennis, which they caught, and I ended up -- I ended up in the middle of the street.

...

Q. But can you say what it was that your foot caught on?

A. It was a raise in that, in that public sidewalk.

Q. Can you point to where it was?

A. To answer your question is -- when my feet got caught, I didn't have time to -- I know my feet got caught. So I didn't have time to try to -- you know what I'm saying? I was hoping to try to -- I caught -- well, I was a big -- I'm a big guy. So my feet got caught on that sidewalk. And at the time, I know if you look at that sidewalk, it could be -- it's -- it's at numerous places, but I remember hitting my -- hitting my big toe on the concrete, catching -- catching the -- catching the lip, catching the lip on that side of my right toe. I remember that. And I remember my arms extending out and me ending up with a fractured arm. Because at the time, I was trying to go back into the workforce, and this is really stopping me going back into the workforce.

CP 69-70.

On February 14, 2012, the City moved for summary judgment. CP 11-17. In response, Mr. Doss submitted a declaration in which he stated that he did not trip on an irregularity in the sidewalk, but on a tree root in the planting strip adjacent to the sidewalk:

I suddenly remembered that I had not been walking on the side of the sidewalk by the building but in fact

was moving between the curb and the planter trees. I then looked at that tree (the first one past the alley) and saw the root that I now believe caught my right foot and tripped me.

CP 85.

No maintenance requests or claims of any kind were received by the City regarding the 200 block of Blanchard Street at any time before the accident of September 29, 2007. CP 77-79.<sup>3</sup>

Summary judgment was granted on March 30, 2012, and the case dismissed with prejudice. CP 106-107. This appeal followed.

#### IV. ARGUMENT

**Summary judgment should be affirmed because neither of appellant's two versions of his trip and fall is supported by evidence that the city of Seattle breached its duty to him.**

**A. Whether Mr. Doss tripped on the sidewalk or on the planting strip, summary judgment was proper because there is no evidence that the City failed to maintain a public way in reasonably safe condition for ordinary travel.**

A trial court's grant of summary judgment is subject to de novo review. *Green v. A.P.C.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Summary judgment is appropriate if there is no genuine issue of material fact and the party bringing the motion is entitled to

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<sup>3</sup> The investigation of defects at the location was made in connection with a previous lawsuit filed by Mr. Doss in connection with the accident of September 28, 2007. CP 23-27. That suit was dismissed on November 20, 2009, without prejudice. CP 37-40.

judgment as a matter of law. CR 56(c). If the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial,’ then the trial court should grant the motion.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Here, whichever version of Mr. Doss’s accident is assumed to be true, summary judgment should be affirmed because he failed to produce evidence from which a jury could conclude that the City breached its duty of care to him.

Seattle, like all cities, is under a duty to maintain its sidewalks in reasonably safe condition for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). A city can be found liable for an unsafe condition which it did not create only if it had actual or constructive notice of the condition. *Nibarger v. City of Seattle*, 53 Wn.2d 228, 229-30, 332 P.2d 463 (1958). In this case, there is no evidence that the City had notice of any hazard on or near the sidewalk where Mr. Doss was injured.

In fact, the path represented by the two parallel lines drawn by Mr. Doss on the photograph of the sidewalk does not traverse any visible

hazard. Mr. Doss testified that he tripped on a “raise” in the sidewalk, but was unable to point to or describe any such condition in the photo. In response to unambiguous questions, he could not indicate any condition of the sidewalk that caused him to trip. Such inability to identify the mechanism of an injury is fatal to a negligence cause of action. *Marshal v. Bally’s Pacwest, Inc.*, 94 Wash. App. 372, 379-80, 972 P.2d 475 (1999). In *Marshal*, the plaintiff was injured while exercising on a treadmill at a health club. She alleged that the treadmill malfunctioned, but was unable to explain how she was injured. For that reason, her theory of mechanical malfunction was speculative, and thus insufficient to form the basis for a verdict. *Id.* at 379. Likewise, as Mr. Doss was unable to explain how he tripped on the sidewalk, summary judgment was properly granted in this case.

Appellant inappropriately relies on *Rosengren v. City of Seattle*, 149 Wash. App. 565, 205 P.3d 909 (2009), in which the plaintiff was injured when she tripped on a sidewalk uplifted by a tree root. Appellant cites the case for the proposition that trees are an artificial condition of the land which imposes a duty on the landowner to prevent them from endangering pedestrians using an adjacent sidewalk.<sup>4</sup> But as the photo of

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<sup>4</sup> Appellant’s brief is unpaginated. The citation to *Rosengren* appears in the section titled “There Was Negligence on the Part of the City.”

the sidewalk in this case plainly shows, the sidewalk is not uplifted by a tree root. There is thus no factual support for appellant's contention that the City was negligent because the tree in the planting strip "posed an unreasonable risk of harm to the pedestrian using the abutting sidewalk."<sup>5</sup>

The second version of Mr. Doss's accident has him tripping on a root of a tree *in* the planting strip itself. However, planting strips are not sidewalks, and for that reason need not be maintained to the standard applicable to sidewalks. *Hoffstatter v. City of Seattle*, 105 Wash. App. 596, 600, 20 P.3d 1003 (2001). A pedestrian who chooses to cross a planting strip is expected to pay closer attention to its surface than to the surface of a sidewalk. *Id.*, at 601. In *Hoffstatter*, the plaintiff was injured when she tripped on a bricked-over planting strip that had become uneven as a result of tree roots growing underneath. Because this condition was open and obvious, the court held "as a matter of law, the uneven surface of the bricks was not unreasonably dangerous." *Id.*

Applying the same reasoning here, the City submits that it was not required to maintain the planting strip in the same condition as the sidewalk, that the root described by Mr. Doss was open and obvious, and that Mr. Doss should have paid closer attention to the surface of the

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<sup>5</sup> This passage is on the next-to-last page of appellant's brief.

planting strip once he decided to walk across it. Assuming Mr. Doss's second version of his accident to be true, this court should affirm summary judgment because the planting strip was not unreasonably dangerous as a matter of law.

**B. Mr. Doss cannot create a material question of fact by contradicting his former testimony.**

Subsequent to the deposition in which Mr. Doss testified that he tripped on the sidewalk shown at CP 75, he submitted a declaration in which he stated, “[m]y memory came back of my choosing to proceed down the sidewalk between the curb and the trees to avoid the foot traffic coming at me.” CP 85. But he also states, “I then looked at that tree...and saw the root that I now believe caught my foot and tripped me.” CP 85. Mr. Doss' change of testimony does not create a question of fact.

A self-serving declaration which contradicts prior deposition testimony cannot be used to create an issue of material fact. *Klontz v. Puget Sound Power & Light Co.*, 90 Wash. App. 186, 192, 951 P.2d 280 (1998). While it is true that subsequent testimony which explains a previous statement may not necessarily amount to a contradiction, *see, Safeco Ins. v. McGrath*, 63 Wash. App. 170, 174, 817 P.2d 861 (1991), Mr. Doss's declaration, does not *explain* his deposition testimony, but flatly contradicts it. The two versions of the accident thus do not create a

question of fact sufficient to defeat summary judgment. Moreover, even if these contradictory statements were interpreted as creating an issue of fact, such issue would be moot because the City is entitled to summary judgment under either of Mr. Doss's versions of his accident.

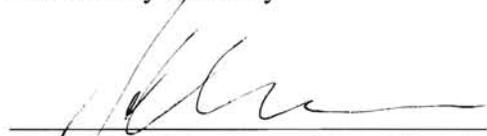
## V. CONCLUSION

Appellant is unable to point to facts showing that the City breached its duty to him under either of the versions of his accident he has provided in this litigation. There is no evidence that the City had actual or constructive notice of any defect on the sidewalk, or that any such defect existed. The tree root on which Mr. Doss also alleges to have tripped was not unreasonably dangerous as a matter of law because it was in a planting strip. Summary judgment of dismissal should be affirmed accordingly.

Respectfully submitted this 15th day of January, 2013.

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By:

  
\_\_\_\_\_  
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## VI. APPENDIX

12-19-11  
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CERTIFICATE OF SERVICE

Susan Williams certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On January 15, 2013, I requested ABC-Legal Messengers, Inc., to deliver, by January 15, 2013, a copy of the foregoing Brief of Respondent upon the following counsel:

Donna Gibson  
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DATED this 15<sup>th</sup> day of January, 2013.

  
\_\_\_\_\_  
SUSAN E. WILLIAMS

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