

651.17-3

65177-3

NO. 65177-3-1

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

RAEGAN McKIBBIN, a single women, *Appellant*,

v.

CITY OF SEATTLE, a municipal corporation, *Respondent*,

PUGET SOUND ENERGY, INC., a public for-profit corporation,
PILCHUCK CONTRACTORS, a for-profit Washington corporation, and
a subsidiary of MICHAEL CORPORATION, a Washington corporation,
Defendants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MICHAEL HEAVEY

APPELLANT'S REPLY BRIEF

LAW OFFICES OF DAVID B. RICHARDSON, P.S.
By: David B. Richardson, WSBA No. 21991
Attorney for Appellant

2135 – 112th Avenue, NE, Suite 200
Bellevue, Washington 98004
(425) 646-9801

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INTRODUCTION

This appeal involves the question of whether wood is an acceptable material for a municipality to use for a modern city street drain grate. The only expert opinion in the case is that it is not, and the preponderance of the other evidence is to the same effect. But the issue herein is not whether wood is an acceptable material, it is whether there is sufficient evidence pointing in that direction that the Plaintiff should be allowed to present that question to a jury. Because a reasonable jury could conclude that wood is not an acceptable material for a city to use for a modern street drain grate, the decision of the Trial Court should be reversed and the case remanded for trial.

The evidence in this case that wood is a negligent choice in this application is overwhelming. The subject drain grate itself was broken when the Plaintiff moved in, and failed again catastrophically within two years of the City's re-installation of wood. CP 207-08. Two broken boards in the same grate within two years is enough to send the case to the jury as to whether the City breached its duty of care. But also, other wooden street drain grates in the same neighborhood had suffered "beam failure" and Plaintiff's expert Bryan Jorgenson stated, following a survey of wooden drain covers in the neighborhood, "Clearly, the wood beams are

failing.” CP 287, 289. Formerly wooden street drain covers in the same neighborhood “similar to the drain of the interest” that had been replaced with “metal drain covers” were “weathering extremely well,” “were in excellent condition and posed no hazard to pedestrians or vehicular traffic.” CP 289, 205 (Photo #1936). This evidence also creates issues of material fact such that the case must go to the jury.

The above is the circumstantial evidence. The direct evidence is from Plaintiff’s expert Bryan Jorgensen whose testimony is unrebutted:

1. Wood drain covers cannot support the weight of foreseeable vehicles using modern city streets without sustaining damage which will lead to catastrophic failure. CP 197-98, 286-88.
2. When wood is subjected to moisture it loses strength, making it a particularly inappropriate material for a street drain cover which is frequently subjected to moisture. CP 197-98, 287, 289-90.
3. Since wood deteriorates over time, it is not a matter of if wood will fail catastrophically in the setting of a municipal street drain grate, it is a matter of when. *Id.*
4. Metal is much stronger and deteriorates exponentially more slowly than wood. CP 197.
5. In 2005, metal grate covers were used by the City of Seattle and “virtually all modern jurisdictions” in “the vast majority of situations.” CP 288-89.
6. Use in a “vast majority of situations” creates an “industry standard.” CP 289.

7. The City violated this industry standard when it chose to employ wooden drain grate covers when rebuilding the subject street drain in 2005. CP 197-98, 288-89.
8. “The use of inferior material as a grate cover resulted in an otherwise easily avoidable injury accident to Ms. McKibbin.” CP 198.

The City has no expert witness, presumably because it is difficult to find a competent expert that disagrees with the notion that metal is the industry standard for modern municipal street drains and wood is not an acceptable material in such applications. Whatever the reason, the un rebutted opinions of Mr. Jorgensen create an issue of material fact which requires the issue of whether the City breached its duty of ordinary care to go to the jury.

The City’s theory is that the Plaintiff should have reported a vehicle parked on the street drain in September 2007. But the City concedes that the Plaintiff and her boyfriend tested the drain under their weight after the vehicle was moved and it “appeared fine.” CP 139. The Plaintiff is not charged with the duty of informing the City of the occurrence of events which are foreseeable to the City. The Plaintiff does not need to report that vehicles use her street, including vehicles used by maintenance. This is the City’s duty to anticipate. She does not need to

report when the boards in the street drain are beginning to look weathered, when they get scratched, or when tire marks appear on their surface.

Rather, it is the City's duty to consider the attributes of the material it chooses for a municipal street drain grate, including whether the material will withstand the weather and water pouring over it and still be able to carry the weight of foreseeable municipal traffic without suffering catastrophic compromise. And it is the City's duty to employ the industry standard, not the Plaintiff's duty to investigate and then inform the City when the substandard material it has chosen might be nearing the end of its useful safe life. The Court should resist the City's attempt to shift these responsibilities and duties from itself and onto the Plaintiff.

No one can say for sure what compromised the wooden board that broke in the subject accident, whether it was exposure to moisture, the passage of time, or foreseeable use by municipal vehicular traffic. But what can be said with absolute certainty is that in 2005, two years prior to the accident, the City violated the industry standard and re-installed a wood grate in the rebuilt street drain, in place of a wooden grate that had just broken. What we know strongly suggests that the City breached its duty of ordinary care, such that the issue should be submitted to the jury.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The City contends that a City database indicates that the City has 5,122 “sandboxes which take in storm water.” Respondent’s Brief (“RB” herein) at 2-3. As stated in the Appellant’s Brief at 13, fn. 3, the only evidence in the record is meaningless raw data which should be disregarded by the Court.

The City claims that the Plaintiff states “inaccurately” that when the City rebuilt the subject street drain grate in 2005 the City “removed all of the wooden boards” and “poured new concrete forms to rebuild the concrete frame where one of the sides had sunk and crumbled.” RB at 3, fn. 3. Plaintiff stated this because this is the only way a concrete box that “extends underground about three feet three feet” can be repaired when the “concrete around the edge of the grate” is “deteriorated and crumbled into the grate.” CP 103, 127. Respondent apparently does not understand that it is impossible to repair crumbling concrete without constructing a form and a form cannot be constructed while the boards forming the grate are still in place. So logically, the boards forming the grate were removed and a form was constructed to repair the concrete. Rather than being inaccurate, what Plaintiff stated is true.

The City also claimed that “the record is silent as to why the single wooden board is missing.” This is not true. Ms. McKibbin testified that her accident “was not the first time one of the wooden boards covering this particular street drain had *broken*.” CP 208 (emphasis added). She continued, “A few years before in 2005, soon after Michael and I had moved into the house, we noticed that another one of the drain cover boards was *broken*.” *Id* (emphasis added). She then stated, “The *broken* 4 X 6 board was replaced with the same wooden board which had *broken* before.” CP 209 (emphasis added). Instead of the “record being silent, the Plaintiff testified that the board was missing because it was broken.

The City claims that in 2005 it only replaced the board that was broken, and not the others. RB at 3. Actually, there is no such evidence in the record. The record submitted to the Trial Court is not clear whether after the City workers removed all four boards, constructed concrete forms and poured new concrete in 2005, they fashioned four new boards or reused three old boards and replaced the broken one. Appellant’s Brief at 8.¹ Either way, obviously to repair the crumbling concrete edge the City

¹ While it is not on the record on appeal, as an Officer of the Court, the undersigned has a duty to report, in the interests of justice, that following the due date for Plaintiff’s Response to the underlying Motion for Summary Judgment, the deposition of Plaintiff’s boyfriend, Michael Clark, was taken, and he testified unequivocally that all four boards were replaced in 2005. Plaintiff will have the deposition transcribed and submitted to the Court if the Court believes that would assist it in rendering its decision. It is, after all, evidence given under oath in this case. Only scheduling prevented it from being presented to the Trial Court.

had to remove the existing wooden boards, build a form, pour new concrete, and then replace the wooden boards in the newly poured frame. Thus, either way, it is correct to characterize the City's work as rebuilding the street drain in 2005. And more importantly, in either scenario, the City made the conscious choice to reinstall wood as the street drain grate rather than metal, despite the fact that metal was the industry standard.

Respondent also claims that the Plaintiff inaccurately stated there were other drain covers in the Plaintiff's neighborhood similar to the drain of interest that had been replaced with metal drain covers which were weathering extremely well. RB at 3, fn. 1. Respondent is wrong. Mr. Jorgenson states in his report:

There were also several metal grate covers in locations similar to the drain of interest ½ - 1½ blocks from the site of the accident. All the metal grate covers were weathering extremely well. They were in excellent condition and posed no hazard to pedestrian or vehicular traffic.

CP 197, 205, Photo #1936 (depicting a formerly wooden drain which had been fitted with a metal grate).

Respondent states that before rebuilding the subject drain in 2005, "The City received no complaints of problems or requests for repair of the wooden cover." Response Brief at 3. This may or may not be true, but the City was obviously out in the Plaintiff's neighborhood prior to 2005

replacing broken wooden street drain grates, whether with wood or with metal. Mr. Jorgenson stated in his report that at “least one of the wooden covers in the immediate vicinity of Plaintiff’s home would appear to have had a beam failure and was replaced.” CP 197. He also stated, “There was clear evidence in another similar drain nearby that it had also failed and had been replaced relatively recently.” CP 197-98. He stated that several similar street drain grates had been replaced with metal grate covers. CP 197. *See also* CP 205, Photo #1936.

The City makes quite an effort to point out that the Plaintiff believed the street drain could support her own weight. RB at 4. Of course she did. But the issue is not whether the street drain grate could support a person’s weight, it is whether it could support the weight of foreseeable municipal traffic, including maintenance vehicles, without sustaining damage that would lead to catastrophic failure at fractions of its former load bearing capacity.

The City claims that after the Pilchuck vehicle was parked on the street drain grate, the Plaintiff said it appeared “compromised.” RB at 5. The City cites to CP 143, a page from the Plaintiff’s deposition where Ms. McKibbin testified:

The board was sitting down a little lower and had a big tire mark on it, so we wanted to make sure that it was still

sturdy because of what happened before when it was broken. And so we went out and kind of tested it by jumping up and down on it a little bit, and it felt like it was secure so I didn't really think much about it after that anymore. CP 143.

Counsel then asked her about the "weight-bearing capabilities of that board," and the Plaintiff stated:

I'm not quite sure how to answer that question because I don't really know enough technical-wise on what the weight-bearing capabilities were, but I know that the cars had driven over it a few times since then and when I stepped on it I fell through it. . . . I don't know if it was different. I mean it didn't appear broke when we were first looking at it. It did appear kind of compromised though, so we tested it out to see. I don't think me jumping up and down and then falling through, I don't think I have enough knowledge to really answer that question.

So rather than saying anything significant about what she may or may not have known about the "weight-bearing capabilities" of the board, the Plaintiff testified that she could not answer the question. She testified that she had been worried it might be compromised so she and her boyfriend jumped up and down on it a little bit and found it was secure, so she did not think much about it anymore. As the City states in its Brief, "They saw no reason to notify the City of a problem because in their opinion, the cover 'appeared fine.' CP 139." RB at 5. So rather than testifying that the board was "compromised" as the City suggests, the

Plaintiff actually testified that she was worried it might be compromised but then determined that it was not.

The City suggests that the Plaintiff believed that before the Pilchuck vehicle was parked on the subject street drain grate, “there was not a problem until that happened,” citing CP 148. RB at 6. This quote is taken from a line of questioning from Pilchuck’s attorney, asking whether the Plaintiff thought that some other car in the neighborhood might have parked on the subject street drain grate, weakening it. Plaintiff’s counsel objected because it called for the Plaintiff to offer an engineering and a legal opinion. *The City joined in this objection.* CP 148. It is fantastic that now the City uses a quote in its Appellate Brief which comes from a question it objected to in deposition. Nevertheless, what the City attempts to do, and Pilchuck before, is to try to turn Plaintiff Raegan McKibbin, a permanent cosmetics technician, into a super engineer, asking her to decide what sort of vehicles and events may have compromised the integrity of the subject wooden street drain beam.

In doing so, the City actually confuses two separate points. The first point is one about which the Plaintiff may testify: she jumped up and down on the street drain after the Pilchuck vehicle was parked on it and it “appeared fine.” CP 139. This is simply her recollection of the event.

But the other point is asking the Plaintiff to look back and speculate about what might have caused the board to weaken, leading to its catastrophic failure in the accident. Ms. McKibbin has said that looking back she thinks there may have been a temporal relationship between the Pilchuck vehicle parking on the street drain grate and the street drain grate collapsing a month later under her own weight. But this was only her speculation since she jumped up and down on the board after the Pilchuck vehicle was moved and it “appeared fine.” CP 139. What the City plainly wishes to do is to invite Ms. McKibbin to look back and speculate about what event might possibly have weakened the board, and then claim that she was under some duty to report this event, as if she should have been clairvoyant at the time, despite the fact that she jumped up and down on the street drain grate and it “appeared fine.” CP 139. In fact, this entire speculative line of reasoning (that the Pilchuck vehicle may have weakened the board and then, through the forces of moisture and weatherization, the board was weakened further to the point where it could not carry Ms. McKibbin’s weight), only underscores Mr. Jorgensen’s testimony that wood cannot carry the foreseeable loads of modern municipal traffic, which is why it is not the industry standard, and not an appropriate material for use in a municipal street drain grate.

The City claims that “the trial Court struck Jorgenson’s Report as irrelevant to the notice issue.” RB at 7. This is not so. What the Court did was in one sentence grant the City’s Motion to Strike the Report of Bryan Jorgenson. CP 321. In its Motion to Strike, the City argued that Mr. Jorgenson’s Report was not in declaration form and his opinions lacked foundation because as an accident reconstructionist, the City did not believe he was qualified to render his opinions. CP 226-231. Nowhere in its Motion to Strike did the City mention the issue of relevance.

The City claims that Plaintiff’s characterization of the Court’s decision in the granting of Pilchuck’s motion for summary judgment is not correct. RB at 9, fn 5. The City claims there had been no “specific findings of fact or conclusions of law in the Court’s Order.” *Id.* The Plaintiff never claimed there were findings or conclusions in the Order, but Pilchuck argued in its Motion for Summary Judgment that it breached no duty owed to the Plaintiff or the City by parking its vehicle on a City street, and that there was insufficient evidence that Pilchuck’s vehicle caused any damage to the subject street drain grate. CP 43-53. This is all that is claimed by the Plaintiff in her Brief. Appellant’s Brief at 17. It is puzzling that the City would make this argument just after claiming that

the Court struck the Report of Bryan Jorgenson because it found it was irrelevant on the notice issue, despite no such findings by the Court and despite not having argued relevance in its Motion.

Finally, the City contends that the dates in Plaintiff's Brief with regard to the Motion for Reconsideration were incorrect. The City claims it filed its Response on March 5th, not March 6th. RB at 8, fn. 6. The City's Response is dated March 6, 2010. CP 353. It is hard to imagine how the City filed a Response before it was signed. The City claimed that the Plaintiff filed her Reply on March 10, 2010, rather than March 9, 2010. As the City knows, the Plaintiff attempted to file her Reply on March 9, 2010, but the Court's e-filing system did not accept the version of the Plaintiff's .pdf file which was submitted. This was corrected the next morning and the Brief was accepted by the e-filing system. It is true that the Court struck the Reply from its Order, no doubt because the e-filing system incorrectly indicated that the Brief was filed late. The Plaintiff was left with no remedy but this Appeal.²

REPLY TO RESPONDENT'S ARGUMENT

As stated in Appellant's Brief, Appellate review of the trial Court's

² The City points out that on pages 14 and 15 of Appellant's Brief there are dates in 2010 which Plaintiff mistakenly sets out as 2009. This is correct. The following dates should have been designated as 2010: January 8, 2009, January 26, 2009, February 1, 2009, and February 3, 2009 (twice). Plaintiff apologizes to the Court for this error.

Order on Summary Judgment is *de novo*. *Wilson v. Steinback*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). As pointed out by the City, the standard of review for evidentiary decisions of the trial Court, including the trial Court's decision to strike the Report of Bryan Jorgenson, is abuse of discretion. "A trial court abuses its discretion when 'discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion.'" *Nepstad v. Beasley*, 77 Wn. App. 459, 468, 892 P.2d 110 (1995) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The City's Brief reads as if the alternative instruction, WPI 140.02, is the standard, preferred instruction and the standard instruction, WPI 140.01, is the alternate instruction. The City argues that "the Notice exception applies as long as the City did not . . ." RB at 11. This is not the law. The standard instruction is still WPI 140.01, which provides:

The City has a duty to exercise ordinary care in the design, construction, maintenance, and repair of its public roads, streets, and sidewalks to keep them in a reasonably safe condition for ordinary travel.

In contrast, WPI 140.02, the alternative instruction, is rife with warnings that it not be used in situations in which the unsafe condition complained of was created by the municipality's employees, the municipality's negligence, or when the unsafe condition was one which

the municipality's employees or agents should have reasonably anticipated would develop. WPI 140.02. The comment to WPI 140.02 states:

The notice requirement does not apply to conditions that are created by the municipality or its employees or to conditions that result from their conduct. *Batten v. South Seattle Water Co.*, 65 Wn.2d 547, 398 P.2d 719 (1965); *Palmer v. Puyallup*, 50 Wn.2d 627, 313 P.2d 1114 (1957); *Russell v. Grandview*, 39 Wn.2d 551, 236 P.2d 1061 (1951).

Nor does the requirement apply if there was a duty to anticipate unsafe conditions. *Argus v. Peter Kiewit Sons' Co.*, 49 Wn.2d 853, 307 P.2d 261 (1957).

If the unsafe condition was created by the municipality either directly through its negligence or if it was a condition that the municipality should have anticipated, *then* WPI 140.01, Sidewalks, Streets and Roads—Duty of Municipality, *adequately covers the duty of the municipality and there is no need for any special instruction on notice.* [Emphasis added]

Plaintiff submits that this is clearly a case in which WPI 104.01 adequately covers the duty of the municipality and there is no need for any special instruction on notice. The unsafe condition alleged by the Plaintiff in this case is the use of wood boards as the grate cover for the subject street drain when rebuilding the street drain in 2005, rather than the use of metal, which was the industry standard. If the City had complied with the industry standard in 2005 and installed a metal grate, this accident would not have occurred.

Indeed, the facts in this case are a case study with regard to why metal is the industry standard for street drains, rather than wood. *See* list of the characteristics of wood, *supra*, at 2-3. The City had a duty to anticipate precisely what the City alleges happened in this case, that a vehicle authorized to use the city streets would contact the street drain grate, weakening it, leading to later catastrophic failure. Mr. Jorgenson testified that, “It is the nature of wood that it deteriorates over time and it rots more rapidly when damaged as water is allowed to access the interior fibers of the beam.” CP 197. Mr. Jorgenson also indicated that Plaintiff’s recollection of the Pilchuck vehicle “stressing the grate cover” was a reasonable explanation for the ultimate failure of the beam. CP 197. This is simply a case study of why wood is an inadequate material for all the reasons stated. Mr. Jorgenson stated, “The use of inferior materials as a grate cover resulted in an otherwise easily avoidable injury accident to Ms. McKibbin.” CP 198.

The City could anticipate that wood was an inadequate material for this application. Metal was the industry standard at the time and other nearby wooden drains and the subject drain had failed. CP 197. Unsafe conditions which a city’s employees or agents should have reasonably

anticipated would develop are not covered by WPI 140.02. They rather call for the use of the standard instruction, WPI 104.01.

The remainder of Respondent's Brief is dedicated to an analysis of the notice issue which clearly does not apply to this case. The City cites *Wilson v. City of Seattle*, 146 Wn. App. 737, 194 P.3d 997 (2008), for the proposition that the City did not receive adequate notice. *Wilson* was the classic manhole cover case where there was no allegation that the City had breached its duty of construction, design, maintenance, or repair. The manhole cover met the industry standards and Plaintiff's contention was that it should have contained a lock so third parties could not tamper with it. A lock was not the industry standard and when a third party placed the cover in a position where it would flip when stepped upon, Plaintiff was injured. This is a classic case of the proper application of WPI 140.02 where the municipality met the industry standard in the construction, design, maintenance, and repair of manhole cover, but it became dangerous because a third party moved it. This is precisely the temporary condition "created by others" of which the City must have notice before liability will attach. See *Erdman v. B.P.O.E.*, 41 Wn. App. 197-207, 704 P.2d 150 (1985).

The City cites *Russell v. Grandview*, 39 Wn.2d 551, 554, 236 P.2d 1061 (1951), for the proposition that “if the defects do not occur by reason of active negligence upon the part of the City, the duty to repair cannot arise until the City has actual or constructive notice of the defects.” The use of wood to rebuild the street drain grate in 2005 rather than the industry standard of metal, *is* active negligence on the part of the City. Indeed, *Russell v. Grandview* is a case cited by Plaintiff in her Brief, as one of a long line of cases that holds “if . . . the dangerous condition is caused by agents of the City in the performance of their duties, the rule of liability is not based on notice and failure to repair, but upon the creation of a dangerous condition by the City.” *Id* at 554.

The City surprisingly cites *Erdman v. B.P.O.E.*, 41 Wn. App. 197, 704 P.2d 150 (1985). There, the municipality created a hazard by improperly installing a dishwasher which eventually led later to a defect (a leak) which caused the accident. This is precisely analogous to the City’s actions in this case of improperly rebuilding the street drain in 2005 by installing wood instead of metal which eventually led to the accident. In both cases, WPI 140.01 applies because the municipality created the dangerous condition. *Id.* at 205-06; RB at 14.

The City claims the use of wood was not a breach of the duty of ordinary care because “there must be some reason for the City to know it is dangerous.” RB at 15. The City claims that “the City cannot have known the condition was dangerous.” *Id.* Of course the City had every reason to know it was dangerous. First, the City is charged with knowledge of the industry standard at the time. *Ruff v. King County*, 125 Wn.2d 697, 705 fn.5, 887 P.2d 886 (1995). Second, the reason that the City had to rebuild the street drain in 2005 was because one of the wooden boards had broken. CP 108. Third, other wooden street drains in the neighborhood had suffered “beam failure” and other formerly wooden street drain covers “similar to the drain of interest” had been replaced with “metal drain covers.” CP 299. As Mr. Jorgenson testified, “Clearly, the wood beams are failing.” CP 287. Fourth, the City’s engineers should know the properties of wood as well as anyone, and know that those properties make it inadequate to carry the loads of foreseeable municipal vehicular traffic. CP 288, 296. For all of these are reasons, the City should know that in this application, the choice of wood was dangerous.

The City cites *Batton v. South Seattle Water Co.*, 64 Wn.2d 547, 398 P.2d 719 (1965), a case which was cited by the Plaintiff and which stands for the proposition that “where a municipal corporation creates the

dangerous condition, no notice is required.” *Batton* at 550-51. The City argues that, “unlike the situation in *Batton*, in the present case, the City did not create this condition but inherited the storm drainage system that was already in place.” RB at 17. But obviously, the City elected to use wood for the grate when it rebuilt the street drain grate in 2005. And also, given that the wooden grates in the neighborhood were failing, there is at least an issue of material fact as to whether the City should have used wood again.

The City contends that “no one knows the cause” of the missing board in 2005 and that “it would be purely speculative to say that it was caused by the wood material failing.” The City continues, “It is just as likely the cover was vandalized.” RB at 17. Actually, Plaintiff testified repeatedly that the board was “broken.” CP 208-09.

The City’s discussion of *Hunt v. City of Bellingham*, 171 Wash. 174, 17 P.2d 870 (1933), leaves off the most important point in the case. The City’s characterization of the background facts of *Hunt* were that the Plaintiff in that case had complained to the City a year before her accident, and the City had “*made a repair.*” RB at 18 (emphasis added). What the City leaves out is what sort of repair the City of Bellingham made, which was central to the holding of the case. In *Hunt*, the City of Bellingham installed “a new box . . . of the same kind and construction of those used in

larger Cities and throughout the Pacific Coast.” *Hunt* at 177. In other words, it replaced the old meter box with one that conformed to the industry standard existing at the time (in 1933). The *Hunt* Court held that because the City of Bellingham had employed the industry standard (as opposed to various other possibilities recommended by the Plaintiff), the City had not created the hazard and thus notice that someone had removed the lid to the meter box (which required a pick) was required before liability would be imposed. *Hunt* at 176-77.

The City alleges that the question to be resolved in this appeal is, “Whether the compromised sandbox cover existed for a sufficient period of time for this City to have constructive notice of its existence, and a reasonable opportunity to correct the condition.” RB at 19. Here the City argues against a straw man of its own creation, a “compromised sandbox cover” which does not exist in the evidence before the Court. Rather, the evidence before the Court is that after the Pilchuck vehicle was parked on the drain grate, the Plaintiff and her boyfriend jumped up and down on the grate cover and it “appeared fine.” CP 136. Whether the street drain grate was compromised from this point forward is a matter of speculation. But it is interesting to note that under the City’s theory it can never be liable,

because it demands notice in a situation in which no rational person would provide notice, because no problem was known to exist.

Compare the logic of the City's theory with the Plaintiff's theory, which is simply that WPI 140.01 applies, and the City is responsible for the natural and foreseeable consequences of its decision to employ wood rather than the industry standard of metal when rebuilding the street drain in 2005. Under the City's theory, it would never have to answer for its decision in 2005 to violate the industry standard and install wood in a municipal street drain because the defects which accumulate in the wood over time lie hidden until the beam fails catastrophically. Thus, the City would never be on notice. In this legal universe, negligence in construction apparently does not exist, and citizens are charged with the discovery of the City's prior negligence and must inform the City of the same before the City will become responsible.

Underscoring the irrationality of the City's argument, it alleges that it is likely that the damage to the board which resulted later in catastrophic failure was caused either by the "Plaintiff and her boyfriend jumping on the board," or "it was not damaged at that time." RB at 20. If two individuals jumping up and down on a modern municipal street drain grate can damage the grate so that it later fails catastrophically, how can it

possibly be said that such a street drain grate was competent to carry the weight of foreseeable vehicles using the street? Further, the City's argument in this regard is flatly irrational. As the City points out earlier in its Brief at pages 3 and 4, the Plaintiff and her boyfriend jumped up and down on the street drain grate in 2005 after the City rebuilt the street drain grate and it seemed fine. CP 127. Why would jumping up and down on the street drain grate two years later cause it to sustain such damage that it catastrophically failed? And if they jumped up and down on the boards and they were fine in 2005 and did not need to call the City then, why would they be required to call the City in 2007 after they jumped up and down on the boards and they were also fine? As is easy to see, the City's argument makes no sense.

The other possibility offered by the City is that the board was not damaged in September 2007 after the Pilchuck vehicle was parked on it and the Plaintiff and her boyfriend jumped up and down on it to test it. If that is the case, under what theory does the City allege that the Plaintiff should have alerted the City?

At page 21 of Respondent's Brief, the City states that, "There was no allegation in 2005 that the wooden cover was somehow inadequate or that the wood should be replaced by iron or other metal, which is what the

Plaintiff now claims.” RB at 21. Again, this is simply not true. The Plaintiff felt that the grate should have been replaced with metal from the beginning. CP 127, 147. But what difference does it make whether the Plaintiff objected to the wood grate in 2005? Is the City’s theory that a private citizen must inform the City of its duty to employ the industry standard and use ordinary care, otherwise liability cannot attach?

Continuing in this line of argument, the City argues at page 22 of its Brief that it should be allowed to rely upon citizen complaints with regard to defects or it could not maintain thousands of miles of public ways in a safe condition. Of course, this is just a restatement of WPI 140.02. It is the law that where a municipality has complied with the standard of care in the construction, design, maintenance and repair of public streets, the municipality must be on notice of defects created by others before liability may attach. *See* WPI 140.02 and the Comment thereto. But where the City’s negligence in the construction, design, maintenance or repair of its streets is the reason for the existence of the unsafe condition in the first place, or where the unsafe condition is one which it had a duty to anticipate, no notice is required. *Id.*

The City cites *Ruff v. King County*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995), for the proposition that the City does not have to “anticipate

and protect against all imaginable acts of negligent drivers' for to do so would make . . . [the City] an insurer against all such acts." But the Plaintiff only asks the City to anticipate that foreseeable modern municipal traffic will occupy city streets and parking areas. And it is important to note that the Court in *Ruff* was careful to point out that the municipality at issue therein had not violated any industry standard in its maintenance or construction of the road in question. *Ruff* at 707, fn 5. This distinguishes *Ruff* from the present case.

The City claims that the Plaintiff "cannot cite an industry standard which requires street drain grates to be metal in 2005." RB at 23. This is not true. The unrebutted testimony of the only expert in this case, Mr. Jorgenson, is that, "Virtually all modern jurisdictions use metal drain covers," "The City of Seattle uses metal for the vast majority of their drain covers," and "[u]se in 'vast majority of situations' creates a 'industry standard.'" CP 289. This led Mr. Jorgenson to conclude that, "Metal is the industry standard for drain covers." *Id.*

With regard to the Trial Court's decision to grant the City's motion to strike the Report of Bryan Jorgenson, the City has apparently abandoned all the arguments it made in its motion before the Trial Court and adopted a new and novel argument in this appeal. Before the trial Court, the City

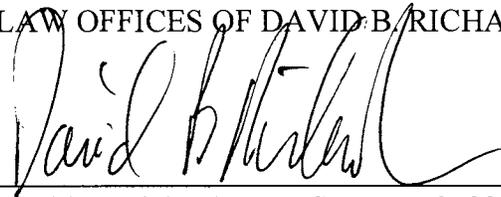
argued that Mr. Jorgenson's Report lacked foundation under ER 702 and that the Report had not been sworn. CP 226-31. Now, in this appeal, the City argues for the first time that Mr. Jorgenson's Report was "stricken as irrelevant." RB at 24. Of course, all the Court did was grant the City's motion in which it alleged that Mr. Jorgenson's Report lacked foundation and was not sworn. See discussion, *supra*, at 11-12. There was no suggestion whatsoever by the Court, nor is there any in the record, that the Report was stricken as irrelevant.

CONCLUSION

For the reasons stated, the Plaintiff requests this Court reverse the decision of the Trial Court and remand, with the findings outlined on page 49 and 50 of Appellant's Brief.

Respectfully submitted: October 11, 2010.

LAW OFFICES OF DAVID B. RICHARDSON, P.S.

A handwritten signature in black ink, appearing to read "David B. Richardson", written over a horizontal line.

David B. Richardson, WSBA No. 21991
Attorney for Appellant

NO. 65177-3-1

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

RAEGAN McKIBBIN, a single women, *Appellant*,

v.

CITY OF SEATTLE, a municipal corporation, *Respondent*,
PUGET SOUND ENERGY, INC., a public for-profit corporation,
PILCHUCK CONTRACTORS, a for-profit Washington corporation,
and a subsidiary of MICHAEL CORPORATION, a Washington
corporation, *Defendants*.

AFFIDAVIT OF SERVICE

I, David B. Richardson, certify and state that I am a citizen of the United States and a resident of the State of Washington; I am the attorney for Plaintiff in the above-entitled cause; on October 11, 2010, I caused to be served upon the Court of Appeals, Division I, and Respondent's Attorney of record at the addresses and in the manner described below, Appellant's Reply Brief, as follows:

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Division One

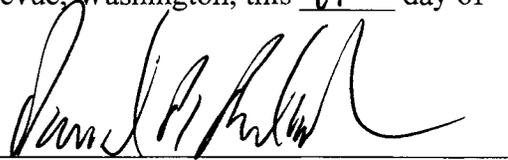
In Person
 By Electronic Mail
 By US Mail
 By Legal Messenger

Stephanie P. Dikeakos,
WSBA No. 27463
City of Seattle, Tort Division
Phone Number: 206-684-8200

By Electronic Mail
(per agreement)
 By Legal Messenger
 By Facsimile
 By US Mail

I hereby declare under the penalty of perjury of the laws of
the State of Washington that the foregoing is true and correct to the
best of my knowledge and belief.

DATED at Bellevue, Washington, this 11th day of
October, 2010.



David B. Richardson