

66336-4

66336-4

NO. 66336-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KAREN HATCH,

Appellant,

v.

KING COUNTY, ET AL

Respondents.

2011 MAR 29 10:07 AM
CLERK OF COURT
JULIE A. HARRIS
CLERK OF COURT

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH M. ANDRUS

BRIEF OF RESPONDENT KING COUNTY

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ORIGINAL

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I. ISSUES PRESENTED

Whether the trial court properly granted Defendant-Respondent King County's motion for summary judgment when King County did not breach its duty of ordinary care to Plaintiff-Appellant Karen Hatch or proximately cause her injuries?

II. STATEMENT OF THE CASE

Plaintiff-Appellant Karen Hatch sued King County and the Snoqualmie School District for injuries she sustained when she walked into or tripped over a historic wall/fence footing near Fall City Elementary School on December 1, 2006. CP 18-21. King County did not learn of Mrs. Hatch's injury until more than 15 months later when she filed a claim for damages. CP 19. On the afternoon she was injured, Mrs. Hatch was going to pick up her son at Fall City Elementary School. CP 25. She had her younger son and his friend Katie with her. CP 26. Mrs. Hatch typically used the school parking lot, but on this occasion it was full so she parked on the street. CP 25-26. Mrs. Hatch parked head-in between two cars, and she may have been parked partially on the sidewalk.¹ CP 36-38.

¹ Plaintiff's expert, Gary Sloan, testified that a reasonable person parking in the area head-in toward the sidewalk as plaintiff did "would go ahead and make use of that curbing [on which plaintiff was injured] as a reference point." CP 144. Further, Dr. Sloan admitted that generally people "should be attentive to their environments." CP 143.

She had never parked there before. CP 26. Mrs. Hatch described the incident as follows:

I pulled in to park, and it was tight parking, pulled in, parked. I had two five-year-olds in the car, Katie and Toby. Katie jumped out one door; Toby jumped out the other. One took off. One was standing behind me. And I started walking towards the school, talking to Katie to tell her to stop running away from me, turned to make sure my other son was -- my son was following along, and just walking towards the school, and then the next thing I knew, I was screaming. ... I recall my shin hitting something and snapping, and hearing a break, but that was the only -- I mean, I was walking, looking, yelling, and then I was on the ground screaming.

CP 26-27. Mrs. Hatch hit her shin on a piece of concrete which sat behind the sidewalk and was a footing for a historic wall/fence that used to enclose the elementary school. CP 42.

In May 2008, Mrs. Hatch visited the scene with her attorney and someone spray painted an X on the piece of concrete which injured her. CP 42. *See also* CP 33-34. During her deposition, Mrs. Hatch confirmed that she did not trip or slip on the sidewalk at the time of the incident. CP 33. She said that the piece of concrete that injured her was part of an historical building. CP 36. Mrs. Hatch could not offer any testimony about the condition of the area on the date she was injured, including whether it looked any different than the photograph she reviewed. CP 34-

35. There were no witnesses to her fall. CP 28. Mrs. Hatch did not know of anyone else who was ever injured in the area or who called to complain about it. CP 39.

King County's road right of way in this area includes 334th Place SE near its intersection with SE 42nd Street. CP 44. There was also a sidewalk in the right of way along the west side of 334th Place SE. *Id.* Additionally, behind the sidewalk, but not connected to it, were footings to a historic wall or fence which apparently used to enclose the elementary school. *Id.* See also CP 48. There are multiple signs in this area that say "Parallel Parking Only." CP 44. There is no curbing in this area, and the grassy area behind the historic wall/fence was maintained by the school district. *Id.* King County has no definitive records of installing either the sidewalk or the historic wall/fence. *Id.* King County considered this particular sidewalk to be a non-standard feature in the right of way because it was apparently not installed by King County and because of its distance from the traveled portion of the roadway. *Id.* The wall/fence footings were also a non-standard feature because they were not installed by King County. *Id.* For these reasons, neither the sidewalk nor the wall/fence footings would be maintained by King County on a set schedule. *Id.* Additionally, under King County Code 14.52.020, sidewalk repairs are the responsibility of the adjacent property owner. *Id.* Although

King County was not maintaining these structures, the roads department would have responded and investigated in the case of a safety complaint.

Id.

Brandy Rettig, a roads engineer, visited the scene sometime between August 11 and 21, 2008, after Mrs. Hatch was asked to mark with spray paint the exact area where she was injured. CP 44. When Ms. Rettig went to the scene, it was clear that the piece of concrete marked with an "X" was one of the historic wall/fence footings and not the sidewalk. *Id.* See also CP 50. There were no modifications made to this location between December 1, 2006, and the time it was spray painted for identification or photographed. CP 44-45. Additionally, each time Ms. Rettig visited the scene the wall/fence footing, as well as the other historic wall/fence footings in the area, was clearly visible and not hidden in any way. CP 45. The area where this incident occurred is well off the traveled portion of the roadway, and King County was unaware that the sidewalk and wall/fence footings were in the County right of way until after it was notified of this incident and a survey was completed. *Id.*

On September 11, 2008, King County Roads representatives, including Ms. Rettig, met with Fall City Elementary School Principal Dan Schlotfeldt and Snoqualmie School District officials, to discuss the County's removal of the sidewalk adjacent to the historic wall/fence. CP

45. During that meeting, it was clear that school officials thought the wall/fence was part of the historic school and on school grounds. *Id.* Additionally, County officials were told that the sidewalk at issue was not used by the school children. *Id. See also* CP 52-53.

King County determined that it would remove the sidewalk to eliminate any hazards to pedestrians. CP 45. The County also removed the historic wall/fence footings, and part of the wall which was still standing, at the request of Snoqualmie School District officials. *Id.* The school district paid King County for the work. *Id. See also* CP 55. When the historic wall/fence footings were removed on October 9, 2008, it was clear that the concrete footings had been poured separately from the sidewalk and were not connected in any way. CP 45. *See also* CP 57. Aside from the incident involving Mrs. Hatch, King County has no records of any other injuries occurring to pedestrians in this area or of any safety complaints received. CP 46. Had King County received a safety complaint, it would have responded to the scene, investigated, and taken action as needed. *Id.*

Plaintiff's complaint alleges that the defendants failed to design, construct and/or maintain the subject sidewalk in an unsafe condition and manner. Additionally, plaintiff alleges that the unsafe condition was either created by the defendants or was a condition of which defendants had

actual and/or constructive notice. CP 18-21. On October 14, 2010, King County and the Snoqualmie Valley School District filed their respective motions for summary judgment. CP 5-14 (King County's Motion for Summary Judgment); CP 58-65 (Snoqualmie Falls School District's Motion for Summary Judgment). On November 12, 2010, King County Superior Court Judge Beth Andrus granted both motions, dismissing plaintiff's claims in their entirety. CP 146-148.

III. ARGUMENT

The trial court correctly granted Defendant King County's motion for summary judgment in this case. King County did not breach its duty of ordinary care to plaintiff Karen Hatch to maintain its roadway in a reasonably safe condition for ordinary travel. The piece of concrete that Mrs. Hatch tripped over was not an unsafe condition. Additionally, King County did not maintain the sidewalk in a manner that posed a risk of injury to pedestrians. King County had no notice of any tripping/falling incidents involving pedestrians in this area, nor had King County received safety complaints of any kind. Further, the historic wall footing that plaintiff walked into/tripped over was an open and obvious condition that King County was not required to warn plaintiff against. Defendant King

County respectfully requests that the judgment of the trial court be affirmed.

A. THE TRIAL COURT PROPERLY GRANTED DEFENDANT KING COUNTY'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXIST NO GENUINE ISSUES OF MATERIAL FACT AND KING COUNTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A trial court's grant of summary judgment is reviewed *de novo*, thus the Court will engage in the same inquiry as the trial court. *Walker v. King County Metro*, 126 Wn.App. 904, 907, 109 P.3d 836 (2005). Summary judgment is appropriate if the pleadings, admissions, answers to interrogatories and 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). See *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). In response to a motion for summary judgment, the nonmoving party may not rely solely on his pleadings but must set forth specific facts showing that there is a genuine issue for trial. CR 56(e). Additionally, the facts submitted and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249, 850 P.2d 1298. The motion should be granted if, from all the evidence, reasonable persons could reach but one conclusion. *Scott v. Blanchet High School*, 50 Wn. App. 37, 41, 747 P.2d 1124 (1987), *review denied*, 110 Wn.2d 1016

(1988). A summary judgment motion should not be denied on the basis of an unreasonable inference. *Scott*, 50 Wn. App. at 47, 747 P.2d 1124. There are no genuine issues of material fact in the case at bar and, as discussed below, Defendant King County is entitled to judgment as a matter of law.

B. KING COUNTY DID NOT BREACH ITS DUTY OF ORDINARY CARE TO PLAINTIFF TO MAINTAIN ITS ROADWAY IN A REASONABLY SAFE CONDITION FOR ORDINARY TRAVEL OR ITS SIDEWALK IN A MANNER THAT POSED NO RISK OF INJURY TO PEDESTRIANS.

In order to succeed in a negligence action, a plaintiff must establish (1) the existence of a duty owed; (2) breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury. *Pedroza v. Bryant*, 101 Wn.2d. 226, 228, 677 P.2d 166 (1984). The threshold determination in any negligence action—whether a duty is owed—is a question of law. *Id.* Plaintiff must produce evidence sufficient to show that the defendant breached the required standard of care. *Walker*, 126 Wn.App. at 908, 109 P.3d 836 (2005). If he fails to do so, summary judgment must be entered. *Id.* Here, King County owed plaintiff a duty of ordinary care to maintain its roadway in a reasonably safe condition for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). King County also owed a duty of ordinary care to maintain the sidewalk in a manner that did not pose a risk of injury

to pedestrians. *Rosengren v. City of Seattle*, 149 Wn.App. 565, 575, 205 P.3d 909 (2009). Regarding conditions created by others, a governmental entity that is responsible for maintaining roads and highways is liable for a dangerous condition which it did not create only if it has notice of the condition and a reasonable opportunity to correct it. *Bird v. Walton*, 69 Wn.App. 366, 368, 848 P.2d 1298 (1993).

1. King County did not breach its duty of ordinary care to plaintiff.

There is simply no evidence that King County breached its duty of care in this case. First, it is undisputed that Ms. Hatch did not slip or trip on the sidewalk. Second, this incident did not happen on the traveled portion of the roadway. Third, the piece of concrete (historic wall/fence footing) that injured Mrs. Hatch was not installed by King County, thus it was considered a non-standard feature that would not be regularly maintained by King County. CP 44. It was apparently installed by defendant Snoqualmie School District who paid King County to remove it. CP 55. Fourth, prior to Mrs. Hatch's injury and up until the date the sidewalk and wall/fence footings were removed, King County had received no complaints about any injuries to pedestrians or safety issues in this area. CP 46. If King County had received a complaint, it would have responded to the scene, investigated and taken action as needed. *Id.* King

County had no notice of a dangerous condition in this area, and there is simply no evidence that the sidewalk and property were not reasonably safe for ordinary travel. Thus, plaintiff's claims against King County must be dismissed.

Plaintiff relies on *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940), in arguing that a question of facts exists which would preclude summary judgment. *Berglund*, however, is distinguishable from the instant case because it dealt with an accident that occurred on a county bridge. *See generally Berglund, supra*. King County admittedly owes a duty to keep its roadways in a safe condition for ordinary travel. However, it is undisputed that this incident did not occur on the roadway. In fact, it occurred a fair distance away from the traveled portion of the roadway. There is absolutely no evidence that the roadway adjacent to the location of this incident was unsafe in any way. Further, as described above, the piece of concrete which plaintiff tripped over was not a dangerous condition. It was an open and obvious condition that King County had no duty to warn plaintiff against. The trial court's order granting King County's motion for summary judgment should be affirmed.

2. As a matter of law, the piece of concrete plaintiff tripped over was not an unsafe condition.

In order for plaintiff's claim to proceed against King County, she must show that King County was required to do something with respect to the wall footer that it failed to do. Plaintiff maintains that the wall footer was an unsafe condition and that King County had constructive notice of it. Plaintiff argues that the *Hoffstatter v. City of Seattle* case is distinguishable. To the contrary, it is exactly on point regarding the issue of an unsafe condition. Given the photographic evidence in this case, the trial court properly found as a matter of law that the obvious wall footer, similar to the bricks in *Hoffstatter*, was not an unsafe condition.

Hoffstatter v. City of Seattle, 105 Wn.App. 596, 20 P.2d 1003 (2001). See also CP 48, 50 and 138-139. If the court finds that this particular wall footer was dangerous because it had moss on it, then it would be a temporary condition or defect of which King County clearly had no notice. See *Bird, supra* (government entity is liable for a dangerous condition it did not create only if it has notice of the condition and a reasonable opportunity to correct it). As further discussed below, this wall footer was one of many in the area and it was open and obvious. Indeed, all of the wall footers were open and obvious. King County did not breach its duty of care to plaintiff, thus her claims were properly dismissed.

C. KING COUNTY DID NOT HAVE A DUTY TO WARN PLAINTIFF ABOUT THE OPEN AND OBVIOUS CONDITION WHICH CAUSED HER INJURY.

1. The concrete wall footer on which plaintiff was injured was an open and obvious condition.

The piece of concrete on which plaintiff was injured was an open and obvious condition that King County was not required to warn plaintiff against. The duty owed by a landowner in a premises liability action depends on the status of the person on the land. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). Here, Mrs. Hatch was likely an invitee on the premises. The duty of care owed by a landowner to an invitee "is to exercise reasonable care to protect invitees from dangers that are known to the owner, and that are not open and obvious to the invitee." *Id.* at 138, 875 P.2d 621. Restatement (2nd) of Torts § 343 provides as follows:

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

(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.

The wall footer that plaintiff walked into did not involve an unreasonable risk of harm to invitees. This area had existed in substantially the same condition for decades. Neither King County nor the Snoqualmie School District was ever notified of any problems in the area. The wall footer that plaintiff walked into should not be considered in a vacuum. There is simply no evidence that the concrete wall footer was a dangerous condition. Even if it were, it was certainly reasonable for King County to expect that plaintiff in the exercise of reasonable care would discover it.

2. The declarations of plaintiff's husband and hired expert Gary Sloan do not preclude summary judgment.

The declarations of plaintiff's husband and Gary Sloan do not create a genuine issue of material fact that would preclude summary judgment. Plaintiff's husband's declaration states that the wall footing plaintiff was injured by was "substantially covered in green moss and surrounding fallen leaves." CP 177. Mr. Hatch's declaration referenced photos, several of which were previously provided to King County. King County submitted two of the photos in support of its reply on summary judgment. CP 138-139. Even if the Court believes Mr. Hatch's description, the photos speak for themselves and clearly show the open and obvious condition on which plaintiff was injured. The concrete wall

footings ran the length of the block. Admittedly the Court must consider facts in the light most favorable to the non-moving party, but here the Court has clear photographic evidence which must be considered. *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

In order for this Court to decide that the wall footer was not open and obvious, the wall footer would have to be considered in a vacuum and not amongst the several other wall footers in this area. CP 138-139. See also CP 48, 50. It is simply untenable that plaintiff could not have discovered these wall footings. Plaintiff's expert, Gary Sloan, testified that a reasonable person parking in the area head-in toward the sidewalk as plaintiff did "would go ahead and make use of that curbing as a reference point." CP 144. The wall footers, including the one that plaintiff walked into, were there to be seen. Further, Dr. Sloan admitted that generally people "should be attentive to their environments." CP 143. Had plaintiff done this, rather than admittedly walking with her head turned around just prior to this accident, she certainly would not have been injured. The wall footer that plaintiff walked into was an open and obvious condition that King County was not required to warn plaintiff against. Therefore, plaintiff's claims against King County must be dismissed.

3. The removal of the wall footer at issue after this incident does not create an issue of fact that precludes summary judgment.

Plaintiff's argument that the later removal of the wall footer raises a question of fact regarding liability is without merit. First, plaintiff's contention that King County and the Snoqualmie Valley School District "joined in concert" to remedy the tripping hazard is incorrect. King County decided to remove the sidewalk. However, it only removed the wall footers at the request of the school district. There has been no admission by King County that the wall footer was a dangerous condition. In fact, King County maintains that the wall footer was not a dangerous condition, and the trial court agreed. Further, even if this Court considered the wall footer a dangerous condition, the later removal of the wall footers should be considered a subsequent remedial measure, the evidence of which would be inadmissible under ER 407. ER 407. Plaintiff contends that the evidence would be offered regarding the issue of control, but it is clear that the real intent would be to prove negligence. As such, the evidence should be inadmissible. The later removal of the wall footers does not create a question of fact. Therefore, the judgment of the trial court should be affirmed.

IV. CONCLUSION

Based on the foregoing, Defendant-Respondent King County respectfully requests that the trial court's grant of summary judgment to King County be affirmed.

DATED this 3rd day of March, 2011.

Respectfully submitted,

DANIEL SATTERBERG
King County Prosecuting Attorney

By: 
JESSICA L. HARDUNG, WSBA #30416
Senior Deputy Prosecuting Attorney
Attorney for Respondent King County

CERTIFICATE OF SERVICE/MAILING

I, KARON R. THOMPSON, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

1. I am over 18 years old and competent to testify to the matters set forth herein. I make this declaration based upon my own personal knowledge.

2. I caused to be served **BRIEF OF RESPONDENT KING COUNTY** upon the following via ABC Messenger Service, to be served by March 4, 2011:

John J. Polito
Attorney at Law
9 Lake Bellevue Drive, Suite 200
Bellevue, WA. 98005

3. I caused a copy of the **BRIEF OF RESPONDENT KING COUNTY** to be faxed to the following attorney and also caused a copy of the brief to be sent via Federal Express to:

Brian A. Christensen
Attorney at Law
JERRY MOBERG & ASSOCIATES
451 Diamond Drive
Ephrata, WA. 98823

DATED this 3rd day of March, 2010 at Seattle,
Washington.


KARON R. THOMPSON