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No. 697069

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JERMAINE DOSS,

Plaintiff/Appellant

v.

CITY OF SEATTLE WASHINGTON, a GOVERNMENTAL ENTITY,

Defendant/Respondent

APPELLANT'S OPENING BRIEF

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No. 2 . The trail court erred when it found there was no negligence on the part of the defendant City of Seattle . 1

Issues Pertaining to Assignments of Error

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No. 2 If so, did the owner owe plaintiff a duty to exercise reasonable care that no part of any trees planted by the owner poses an unreasonable risk of harm to the pedestrian using the abutting sidewalk that it would grow out of a tree planted by and owned by the City? 2

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(*Second*) of *Torts* § 3637,8,9

I. INTRODUCTION

This case is an appeal of an order granting summary judgment of dismissal in a trip and fall in the City of Seattle.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1 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 planted by owner/defendant.

No.2 The trial court erred when if found there was no negligence on the part of the defendant, City of Seattle.

Issues Pertaining to Assignments of Error

No. 1. Whether there is a genuine issue of material fact as to whether the plaintiff was proceeding west on Blanchard between the southerly curb and the curb edge of the planter area owned and maintained by the city and as to whether he was approaching the area directly opposite the front door of the Crocodile Café when he tripped and fell over a protruding root and fell in the street between two parked cars?

No. 2 If so, did the owner owe plaintiff a duty to exercise reasonable care that no part of any trees planted by the owner poses an unreasonable risk of harm to the pedestrian using the abutting sidewalk that it would grow out of a tree planted by and owned by the City?

III. STATEMENT OF THE CASE

A. Factual History

On September 28, 2007, Jermaine Doss, plaintiff and appellant, plaintiff tripped over the roots of street tree plaintiff and maintained by defendant/respondent City of Seattle in a tree pit located westerly of the alley on the north side of the Blanchard sidewalk between Second and Third Avenues in the City of Seattle, King County, Washington. (See generally CP 2-7; Declaration of Doss, CP 86). The street tree pit and the area where plaintiff fell is on the north side of Blanchard Street adjacent to and directly in front of the Crocodile Café (CP 83-86; CP 90). The defendant planted, owned and maintained the tree and is therefore responsible for its roots and pit. (*See* inventory of street trees, CP 90).

There is also a declaration from a third party independent witness deposed by the City, testifies that the plaintiff was walking next to the building. (See generally CP 20) There is evidence, however, by the

declaration of Mr. Simpson, that the plaintiff was walking by the curb. (See general, CP 70-79). The plaintiff also testified that he was directly across from the front door and fell in the street. (See, generally Declaration of Doss, CP 83-86) Falling in the street can logically only occur when someone is walking on the curbside of the sidewalk. The statement of Ty Simpson was known to the City, which was provided to them by the owner of the restaurant. He was walking west, away from the restaurant. The sidewalk has three “rows” of traffic. If the plaintiff was on the side near the restaurant, there is no way the plaintiff could have staggered and stumbled across three lanes of sidewalk traffic and then ended in the street.

He is found by the emergency technicians, laying in the street. Doss admitted that his recollection was wrong. This is an issue of fact, which is the sole province of the jury and should be give to the jury to determine.

B. Procedural History

Plaintiff filed a complaint for damages against the City on October 27, 2012. (CP 1-7). Discovery and depositions ensued. Defendants in this case moved for summary judgment of dismissal on February 14, 2012.

(CP 11-19). The matter was heard by the Hon. Joan DuBuque and granted on March 30, 2012. (CP 106-107)

Appellant timely filed this appeal on April 26, 2012.

IV. SUMMARY OF ARGUMENT

Summary judgment is not appropriate in this case because there exists a genuine issue of material fact as to where the plaintiff was walking when he fell. Where plaintiff fell determines whether the defendant owed plaintiff a duty. Factual determinations are the sole province of the jury and the issue should be presented to the jury for determination.

V. ARGUMENT AND AUTHORITY

Summary Judgment is Not Appropriate Because There is an Issue of Fact

A trial court's order of summary judgment is reviewed *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). When there are genuine issues of material fact, as a matter of law, summary judgment is not appropriate. CR 56(c). Only when the pleadings, depositions, admissions, and affidavits considered by the trial court do not create a genuine issue of material fact between the parties is the moving party entitled to a summary judgment. *Ferrin v. Donnellfeld*, 74 Wn.2d 283, 444

P.2d 701 (1968). All facts and reasonable inferences are viewed in the light most favorable to the non-moving party. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The motion should be granted only if, from all the evidence, reasonable men could reach but one conclusion. CR56(c); *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 421 P.2d 674 (1966).

The City argued that because the plaintiff changed his story, that he could not be believed. (CP 11-19) The plaintiff presented declarations regarding the facts in this case to off-set the facts presented by the defense – and to present its claim in the matter. (CP83-86, CP 80-82) In such a case, reasonable men could reach different conclusions and therefore this was a not a case that is appropriate for summary judgment.

Therefore, the judge erred in entering summary judgment and this case should be remanded for trial.

There Was Negligence on the Part of City

The court also entered summary judgment because it determined there was no negligence on the part of the City of Seattle.

To establish a common law negligence claim, a plaintiff must establish four elements: "(1) the existence of a duty . . . ; (2) breach of that

duty; (3) resulting injury; and (4) proximate cause between the breach and the injury." *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). The threshold determination in this negligence action is whether a duty of care is owed by the defendant to the plaintiff. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988); *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

Generally, an owner or occupant of premises is not an insurer of the safety of pedestrians using the abutting sidewalk but must exercise reasonable care when he uses the sidewalk for his own purposes. *Stone v. City of Seattle*, 64 Wn.2d 166, 170, 391 P.2d 179 (1964). However, under RCW 35.22.280(7), a first class city has the primary duty to maintain public sidewalks in a safe condition. The City of Seattle is considered a first class city and therefore has a duty to maintain the sidewalks in a safe condition.

Cases have been upheld in many situations involving sidewalks. The court determined that, under the rule of reasonable care and prudence, a plaintiff who fell into a depression created by the owner driving repeatedly over the sidewalk and causing its deterioration had sufficient evidence to sustain a verdict. *Edmonds v. Pac. Fruit & Produce Co.*, 171 Wash. 590, 593, 18 P.2d 507 (1933). An abutting property owner owed

duty of care to pedestrian who slipped and fell on gravel accumulated on a sidewalk because of vehicles exiting from owner's graveled driveway. *James v. Burchett*, 15 Wn.2d 119, 124, 129 P.2d 790 (1942).

Similarly, an apartment owner was held liable for injuries a pedestrian sustained when she fell into a hole in the sidewalk created by the weight of cars driving consistently over it because it was foreseeable that tenants would drive directly over the sidewalk to reach their parking spaces rather than taking a circuitous route, the driving constituted a special use. *Stone v. City of Seattle*, 64 Wn.2d 166, 168-69, 391 P.2d 179 (1964). Summary judgment for defendant was reversed where plaintiff collided with fire escape extending into her pathway on city sidewalk, because fire escape was illegal and thus per se negligent *Turner v. City of Tacoma*, 72 Wn.2d 1029, 435 P.2d 927 (1967). And the use of a public sidewalk as an exit from driveway gave rise to duty of reasonable care *Groves v. City of Tacoma*, 55 Wn. App. 330, 777 P.2d 566 (1989)

There is also a common law duty owed by a possessor of land to "prevent artificial conditions on his land from being unreasonably dangerous to highway travelers." (Footnote omitted.) 5 F. Harper, F. James & O. Gray, *Torts* § 27.4, at 156 (2d ed. 1986); see Restatement (Second) of Torts § 368 (1965). The duty is founded on the principle

that "[t]he public right of passage carries with it . . . an obligation upon the occupiers of abutting land to use reasonable care to see that the passage is safe." *Prosser & Keeton* § 57, at 388. This duty applies to those passing by on a public walk. *Munger v. Union Sav. & Loan Ass'n*, 175 Wash. 455, 458, 27 P.2d 709 (1933).

The court has also found that there is a duty of a property owner when it involves planting trees near sidewalks.

Trees planted by a property owner are an artificial rather than a natural condition of the land. A property owner owes a duty to exercise reasonable care that no part of any trees planted by the owner poses an unreasonable risk of harm to the pedestrian using the abutting sidewalk."

Rosengren v. City of Seattle, 149 Wn. App. 565 (2009).

Additionally the Restatement (Second) of Tort, notes that:

A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to [them].

Comment b to *Restatement (Second) of Torts* § 363 further explains that trees planted or preserved are artificial conditions on the land:

"Natural condition of the land" is used to indicate that the condition of land has not been changed by any act of a human

being, whether the possessor or any of his predecessors in possession, or a third person dealing with the land either with or without the consent of the then possessor. It is also used to include the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them. On the other hand, a structure erected upon land is a non-natural or artificial condition, as are trees or plants planted or preserved, and changes in the surface by excavation or filling, irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of natural forces.

(Emphasis added.)

Section 363 of the *Restatement (Second) of Torts* defines "natural conditions" as: neither a possessor of land, nor a vendor, lessor, or other transferor thereof, is subject to liability for bodily harm caused to others outside of the land by a natural condition of the land other than trees growing near a highway.

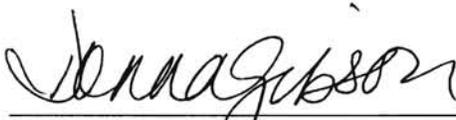
Because the City owned the trees and maintained the planter area, it had a duty to the plaintiff in that the trees it planted created a hazardous condition. The trees it planted created an artificial condition for which the City, as the owner, has a duty to exercise reasonable care that no part of any trees planted by the owner poses an unreasonable risk of harm to the pedestrian using the abutting sidewalk.

This is what happened when Mr. Doss was walking on the City street – he tripped over a condition created by the City. The City was negligent. It's negligence cause the injuries suffered by Mr. Doss.

Vi. CONCLUSION

The order of summary judgment by the trial court must be dismissed and the case remanded for trial.

Respectfully re- submitted this 15th day of October , 2012,



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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

JERMAINE DOSS,

Plaintiff/Appellant,

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CITY OF SEATTLE,

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CERTIFICATE OF SERVICE OF
APPELLANT'S OPENING BRIEF

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I caused this pleading to be served on the persons listed below in the manner shown.

<p>Jeffrey Cowan Seattle City Attorney's Office PO Box 94769 Seattle, WA 98124-4769</p>	<p><input type="checkbox"/> First Class Mail <input type="checkbox"/> Fax: <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email: per agreement jeffrey.cowan@seattle.gov Susan.Williams@Seattle.gov Donna.Robinson@Seattle.gov Yvonne.Hartman@Seattle.gov</p>
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Dated October 15, 2012

Edward K. Le



Facsimile Transmittal

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