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No. 69263-1-I

IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION I

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THE-ANH NGUYEN,

Plaintiff/Appellant.

-vs-

CITY OF SEATTLE, a governmental entity,

Defendants/Respondents,

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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON  
IN AND FOR THE COUNTY OF KING  
CAUSE No: 69263-1-I  
HONORABLE CAROL SCHAPIRA, Trial Judge

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APPELLANT'S REPLY BRIEF

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## **I. INTRODUCTION**

Appellant's brief addresses the issues to be considered on review. Appellant's reply is to address some of the issues raised in respondent's brief. The appellant incorporates the Statement of Facts from the Appellant brief into this reply.

## **II. FINDINGS OF FACT**

The trial court hand wrote in the signed Findings of Fact and Conclusions of Law, "The court incorporates its oral rulings at the end of trial and at presentation in this set of Findings and Conclusions".

The written Findings of Fact on how the accident occurred are as follows:

2. On August 24, 2008 (sic) at about 2:25 p.m., plaintiff The-Anh Nguyen was driving a rented U-Haul truck on Olson Pl. SW, in Seattle, traveling 25-30 mph. The truck was 1997 Ford, with a box-like cargo compartment extending over the passenger cab. Two passengers rode with Mr. Nguyen in the cab. The weather was clear, and the roadway dry and unobstructed.

3. Olson Pl. SW is an arterial street, with two northbound lanes and two southbound lanes and a center turn lane. Mr. Nguyen was driving in the outside northbound lane downhill, i.e., the lane closest to the curb. At the time indicated, the top right front corner of the truck's cargo box struck an overhanging tree branch, planted in the planting strip running along Olson Pl SW, where the large branch of the tree connects to the trunk. The force of the impact damaged the cargo box in the upper corner, and uprooted the tree, cleaving it in such a way that the branch and part of the trunk fell into the roadway

behind the truck. Because of the impact, the truck drove up onto the curb, as Mr. Nguyen and the passenger next to him struggled with the steering wheel to control the truck. The truck travelled about 40 feet on the planting strip, its right rear bumper nicking another tree before returning to the roadway. **The court did not fault Mr. Nguyen's driving; he did not leave the roadway before impact.**

7. **Plaintiff's rented U-Haul was 11 feet tall...**

Findings of Fact and Conclusions of Law No. 2, 3, 7; CP 506-509, RP

Motion Hearing: 16:22-25, 17:1-25, 18:1-25, 19:1-4. Emphasis added.

### III. ARGUMENT

**A. Evidence from the Findings of Fact conclude that The-Anh Nguyen's eleven foot (11') tall rented U-Haul truck struck the overhanging tree and branch less than eleven feet (11') above the roadway.**

The trial court's findings are that the rented U-Haul truck Mr. Nguyen was driving was eleven feet (11') tall. The truck Mr. Nguyen was driving did not leave the roadway prior to striking the overhanging tree and large branch. The court did not fault Mr. Nguyen's driving.

The only reasonable conclusion from the Findings of Fact is that the overhanging tree and large branch Mr. Nguyen struck with the truck was less than eleven feet (11') above the roadway.

**B. City violated SMC 15.42.010 and SMC 15.42.010.**

The City of Seattle agrees in its brief that SMC 15.42.010 and SMC 15.42.020 define the scope of its duty with respect to trees planted in

its infrastructure. In particular, the City agrees that trees which extend above the roadway must be trimmed to a height of 14 feet, SMC 15.42.020; and that no one shall allow any tree trunk, limb or branch to pose a hazard to the public, SMC 15.42.010.

Again, the facts are that Mr. Nguyen's 11 foot (11') rented U-Haul truck did not leave the roadway before it struck the overhanging tree. The force of the impact uprooted the tree trunk that was approximately 20 inches across and the cleaved branch from the collision laid 20 feet across the roadway and back across the planting strip and sidewalk.

1. SMC 15.42.010 General Provisions – Trees states in-part:

No one shall allow to remain in any public place ***any tree trunk, limb, branch, ... which is in such condition as to be hazardous to the public.***

*SMC 15.42.010* Emphasis added.

The tree Mr. Nguyen struck with the truck was a hazard to the public driving on Olson Pl SW. The City allowed the tree it planted to remain on its planting strip. By allowing the roadway-leaning tree to remain in its planting strip over the years, the City allowed a hazard to the public to remain that eventually impeded traffic on Olson Pl SW and collide with Mr. Nguyen's rented U-Haul truck.

The City admits to having planted the tree, admits to being responsible for the maintenance of the tree and admits that it did not have

any records showing maintenance or inspections of the tree for 17 years of growth. RP Vol. III, 469:16 through Vol.III:478:25

The City breached its duty of care to The-Anh Nguyen under SMC 15.42.010 by allowing the tree to remain in its planting strip and become a hazard to the public driving on Olson Pl SW.

2. SMC 15.42.020 Overhanging trees and shrubs states:

***No flowers, shrubs or trees shall be allowed to overhang or prevent the free use of the sidewalk or roadway, or street maintenance activity, except that trees may extend over the sidewalk when kept trimmed to a height of eight feet (8') above the same, and fourteen feet (14') above a roadway.***

*SMC 15.42.020* Emphasis added.

The only reasonable conclusion from the Findings of Fact is that Mr. Nguyen's 11 foot (11') rented U-Haul truck struck a tree and branch less than 11 feet above the roadway, at least 3 feet (3') below the fourteen (14") height standard of care set out in SMC 15.42.020.

The City breached its duty of care to The-Anh Nguyen when the City failed to keep the tree trimmed to fourteen feet (14') above the roadway causing a collision with Mr. Nguyen's rented U-Haul truck driving down Olson Pl SW.

The breach of SMC 15.42.010 and SMC 15.42.020 was the proximate cause of the U-Haul truck Mr. Nguyen was driving to collide

with the overhanging tree and caused the damages to Mr. Nguyen.

**C. Res Ipsa Loquitur: Inference of City of Seattle's Negligence.**

*Curtis v. Lein*, 169 Wash.2d 884, 239 P.3d 1078 (2010) is analogous to this case. In *Curtis*, a tenant was walking on a deck when a stationary stair on the deck gave way. The deck was subsequently destroyed. The deck was under the control of the landowner.

In this case, Mr. Nguyen was driving on the roadway when the truck he was driving struck a stationary overhanging tree. The City of Seattle, owner of the tree, employees arrived at the scene of the accident removed and destroyed the downed tree. No inspection was made of the destroyed tree.

Here, as in *Curtis*, the evidence was destroyed. The Supreme Court held that:

(1) tenant could rely upon res ipsa loquitur to raise inferences of owners' negligent maintenance of the dock, and (2) the tenant was not required to eliminate other possible causes than owners' negligence could have caused the failure of the step on the dock in order for res ipsa loquitur to apply.

The doctrine of res ipsa loquitur spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. The doctrine permits the inference of

negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person. *Pacheco*, 149 Wash.2d at 436, 69 P.3d 324 (citations omitted).  
*Id at 889 -890.*

Mr. Nguyen did not leave the roadway prior to the collision with the overhanging tree. In *Curtis*, the landowner was responsible for the maintenance of the dock step. Here, the City was responsible for the maintenance of the overhanging tree. In both cases, a walking tenant in *Curtis*, and a driving truck in this case, was injured by a stationary item.

The respondent's argument in his brief that truck colliding with the tree and not the other way around is misplaced and irrelevant under the analogy in *Curtis*.

**D. Respondent's reliance on appellant's expert Steven Stockinger is misplaced.**

Respondent in its brief relies on the testimony of Steven Stockinger to show there is no evidence as to the height of the overhanging tree was asked to offer an opinion on the exact height of the overhanging tree. Mr. Stockinger states, "Nobody knows the tree is gone".

However, the fact that Mr. Nguyen's rented eleven foot (11') U-Haul did not leave the roadway prior to striking the overhanging tree leads to only one reasonable conclusion: the tree was a hazard to the public using the roadway and the tree was less than eleven feet (11') above the roadway.

Mr. Stockinger's actual opinion was that the trunk of the tree encroached vertically over the pavement, the place where a car would actually be driving and his opinion was the photograph taken by the City of the tree one year prior to the collision shows the tree encroaching into the roadway. RP Vol III, 394: 6-14.

**E. City's duty to inspect the trees on Olson Pl SW.**

The City planted the trees along Olson Pl SW. The trees and the planting strip between the sidewalk and the roadway was under the control of the City.

A "possessor of land" is a person who is in occupation of the land with intent to control it or a person who has been in occupation of land with the intent to control it. *Strong v. Seattle Stevedore Co.*, 1 Wn. App 899, 900-901, 466 P.2d 545 (1970), *review denied* 11 Wn.2d 963 (1970).

The appellant Mr. Nguyen argues in his brief that with respect to the trees the City planted, it is under the same common law as any "possessor of land" and has the duty to inspect and prevent its trees from causing a hazard and intrude into the roadway. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash.2d 217, 220, 222, 802 P.2d 1360 (1991); *Rosengren v. City of Seattle*, 149 Wash.App 565, 205 P.3d 909 (2009).

The City of Seattle's duty is further defined under its own ordinances SMC 15.42.010 and SMC 15.42.020. The City has an

affirmative duty to keep “trimmed” to fourteen feet (14’) above the roadway. This duty as defined in SMC 15.42.020 cannot be done without inspection and maintenance and inspection of the trees.

Even with the “ad hoc” citizen complaint in place in 2008, the City had notice of a bus “damaged” by striking overhanging tree branches in 2005 on Olson Pl SW, from a tree that was planted at the same time and of the same variety as the tree struck by the truck Mr. Nguyen was driving.

The City argues in a footnote in its brief, the branch the bus struck in 2005 could have been first struck by a vehicle higher than fourteen feet (14’) and then dropped down before being struck by the bus. This is not a relevant and valid argument. RCW 46.44.020 makes it unlawful for any vehicle unladen or with load to exceed a height of fourteen feet above the level surface upon which the vehicle stands (with very limited authorized exceptions) *RCW 46.44.020*.

Municipalities can be and are held liable when they have constructive notice of a hazard. *Hartley v Tacoma School District No. 1 & City of Tacoma*, 56 Wash.2d 600, 354 P.2d 897 (1960).

In this case, even though the City had constructive notice of tree of the planted at the same and or the same variety on Olson Pl SW with overhanging branches and impeding the free travel of the public on the roadway, the City did not inspect and trim the trees on Olson Pl SW.

In this case, the City did not keep its trees trimmed as required under SMC 15.42.020 or keep the tree it planted from intruding into the roadway under SMC 15.42.010. The City had numerous complaints from citizens of overhanging trees and failed to inspect, maintenance, or trim all the trees planted at the same time and of the same variety along Olson Pl SW. The City's failure to inspect and maintain the trees it planted allowed the tree at issue to encroach into the roadway causing a collision and injuries to Mr. Nguyen.

**F. Defense of Notice withheld for tactical advantage.**

The respondent in this case avoided answering the interrogatory asking for the general nature of the defenses to the claimant's claim by stating this question is unanswerable by the City until one week before trial. Appellant did not receive respondent's brief on Lack of Notice defense until the appellant was in front of the trial Judge arguing this issue on the last day of trial. RP Vol. IV, 528-540. Again, whether this was intentional or not, it benefited the respondent and was arguably for tactical reasons.

In this case, the breach of SMC 15.42.010 and SMC 15.42.020 speaks for itself. Notice is not an element that needed to be proven and was not an element of the violation of the ordinance. Notice was not an element of the affirmative duties outlined in ordinances and should not be

allowed as a defense without being plead.

**G. Even if notice need not be pled, *Argus* is on point.**

Under the totality of the circumstance in this case, with the affirmative duty to keep the trees it planted on Olson Pl SW from intruding into the roadway and become a hazard to travelers and trimmed to fourteen feet (14') above the roadway, the defense of "lack of notice" should not be allowed. *SMC 15.42.010, SMC 15.42.020; Ziao Ping Chen v. City of Seattle*, 153 Wn.App. 890, 223 P.3d 1230 (2009), review denied 169 Wn.2d 1003, 234 P.3d 1172 (2010); *Argus v. Peter Kiewit Sons' Company*, 49 Wash.2d. 853, 307 P.2d 261 (1957).

This case is analogous to *Argus v. Peter Kiewit Sons' Company*, 49 Wash.2d. 853, 307 P.2d 261 (1957). In both cases, the defendant had an affirmative duty to keep the roadway safe and in failing to do so attempted to claim "lack of notice" as a defense. The Supreme Court stated:

Appellant could not remain passive until the defect or dangerous condition developed and an accident happened, and then avoid liability on the ground that it had no actual or constructive knowledge or notice of the specific defect or the dangerous condition. In the exercise of due care, it had a duty to anticipate the development of a dangerous condition and guard against it. In the proper exercise of due care, the appellant is chargeable with knowing what might reasonably be expected to happen. *Dillabough v. Okanogan County*, 1919, 105 Wash. 609, 178 P. 802; 25 Am.Jur. 738, § 446.

*Id.* at 855.

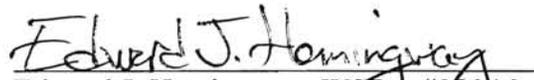
Here as in *Argus*, the defendant had a duty to duty to anticipate the development of a dangerous condition and guard against it. The accident with the overhanging tree in this case was reasonably foreseeable based upon the prior incident on the roadway with the trees planted at the same time and of the same variety. In the proper exercise of due care, the City is chargeable with knowing what might reasonably be expected to happen. Id.

#### IV. CONCLUSION

This reply brief is to address some of the issues from the respondent's brief. Appellant's initial brief outlines the issues on appeal and the standards of law. What is clear, however, the conclusion for the Findings of Fact is that the City failed to keep the roadway for Mr. Nguyen safe for travel, failed to prevent the tree and trees on Olson Pl SW from intruding into the roadway and failed to keep the tree that struck Mr. Nguyen's rental U-Haul more than eleven feet (11') above the roadway.

DATED this 29<sup>th</sup> day of May, 2013

Respectfully submitted,

  
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**CERTIFICATE  
OF SERVICE**

The undersigned does hereby certify that on this 29 day of May, 2013, he caused a true and correct copy of the following document(s):

I. APPELLANT'S REPLY BRIEF

to the individual (s) listed by the following means:

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