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No. 69263-1-I

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

THE-ANH NGUYEN,

Plaintiff/Appellant.

-vs-

CITY OF SEATTLE, a governmental entity,

Defendants/Respondents,

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

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 19 PM 4:21

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2. The trial court erred when it stated in Findings of Fact No. 6 that prior to August 24, 2008, SDOT had received no complaints regarding the tree struck by Mr. Nguyen’s truck when Exhibit 17 shows a tree inventory from 01/19/1992 showing a branch defect.	
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 8. The trial court erred when it stated in Conclusions of Law No. 3 that judgment in favor of the City of Seattle shall be entered forthwith, and erred in Conclusions of Law No. 4 that judgment should be entered for defendant City of Seattle dismissing all of plaintiff's claims in this action with prejudice.
 9. In addition the trial court erred in denying Mr. Nguyen's motion to strike the City of Seattle's defense of lack of actual or constructive notice entered on July 6, 2012.
 10. In addition, the trial court erred in finding that the City of Seattle did not have actual notice or constructive notice of the tree encroaching into the roadway.
 11. In addition, the trial court erred in finding the City of Seattle did not breach its duty to exercise ordinary care to inspect and maintain the trees on Olson PL SW in a reasonably safe condition for ordinary travel on the roadway.
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3. Is the City of Seattle’s manner of maintaining its trees, as an artificially created condition planted by the City of Seattle along its roadways congruent with the common law duty to exercise ordinary care to inspect and maintain its trees to prevent its trees from intruding into its roadways in order to keep its roadways reasonably safe for ordinary travel?
4. Did the City of Seattle breach its duty to maintain Olson PL SW in a reasonably safe manner for ordinary travel when the City will only maintain its roadways after a complaint from the public or roadway traveler or after a roadway traveler such as Mr. Nguyen collides with a tree encroaching into the roadway and when an inspection would have alerted the City of Seattle of the danger?
5. Did the City breach its standard of care to The-Anh Nguyen when they failed to keep its tree trimmed to a height of fourteen feet (14’) above the roadway as required by SMC 15.42.010 and SMC 15.42.020?

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I. INTRODUCTION

On August 25, 2008 at approximately 2:20 p.m., the appellant The-Anh Nguyen was driving a rented U-Haul truck on Olson Place Southwest (hereafter Olson Pl SW) in Seattle, Washington traveling 25-30 mph. RP Vol. III. 427: 12-25, 481:1, RP Vol. II, 143:20-23, RP Vol. II, 332:10, CP 506-509.

The truck was a 1997 Ford, with an eleven foot (11') box-like cargo compartment extending over the passenger cab. Two passengers traveled with Mr. Nguyen in the cab. CP 506-509.

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. CP 506-509. At the time indicated, the top right front corner of the truck's cargo box struck an overhanging tree branch, where the large branch of the tree connects to the trunk, planted in the planting strip running along Olson Pl SW. CP 506-509, RP Motion Hearing, 18:13-18. 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. CP 506-509, RP Motion Hearing, 18:20-25. 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. CP 506-509, RP Motion Hearing, 19:12-25. The truck travelled about 40 feet on the planting strip, its right rear bumper nicking another tree before returning to the roadway. CP 506-509, RP Motion Hearing, 20:2-9. The court did not fault Mr. Nguyen's driving; he did not leave the roadway before impact. CP 506-509, RP Motion Hearing, 20:10-14.

The diameter of the tree trunk damaged in the collision measured approximately twenty inches (20") across. RP Vol., IV, 643:14-19. The cleaved branch from the tree laid approximately twenty-three feet (23') across the northbound lanes of Olson Pl SW and also laid back across the planting strip and sidewalk. Id. On the same day of the collision, City employees took the downed tree away and destroyed the tree and branches. The root ball of the tree was pushed back into the ground. CP 506-509.

The City of Seattle admits they have a duty to maintain the trees along Olson Pl SW. CP 506-509, RP Motion Hearing, 7:13-16. The City admits that at the time of the incident they had no proof of inspecting or maintaining the tree involved in the collision for the seventeen (17) years prior to the incident; a tree inventory record from 01/19/1992 shows a branch defect for the tree at issue. RP Motion Hearing, 7:5-8. The City admits there was no inspection or maintenance program in place to inspect any of the trees along Olson Pl SW. RP Vol. III, 477:8-14. In 1976, the

City initially planted Marshall Seedless Ash trees all along Olson Pl SW. RP Vol. III, 476:2-10. The tree that was knocked down by the collision was in the 9200 block of Olson Pl SW. RP Vol. III, 427:15-18, 361:23-25, 362:1-5. In the ten (10) years prior to the collision, in the 9000 block to 9400 block of Olson Pl SW, there were numerous complaints to the City of branches overhanging the roadway, branches in the roadway, vehicle collisions with trees, an uprooted tree and an overhanging tree branch colliding with and damaging the top of a Metro bus. RP Vol. III, 469: 16-478:25.

As a result of the collision with the overhanging tree, The-Anh Nguyen sustained an aggravation of a disk herniation at L4-L5 causing constant pain and sustained substantial wage loss as a recreation leader for the City of Seattle. CP 506-509, RP Vol. II, 206:1-20. The trial court found, as a result of the collision with the overhanging tree, The-Anh Nguyen incurred medical specials in the amount of \$16,111.15, wage loss in the amount of \$44,615.73, and general damages of in the amount of \$100,000.00. CP 506-509. The trial court also found the City of Seattle had no notice of the encroaching overhanging tree and branch on Olson Pl SW prior to the collision with Mr. Nguyen's rented U-Haul truck and without notice the City was not liable for the damages to Mr. Nguyen. RP Vol. IV, 647:13-15, 650:10-13.

The trial court incorporates its oral rulings at the end of trial and at presentation hearing of the Findings of Fact and Conclusions of Law to the written Findings of Fact and Conclusions of Law. CP 506-509.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in using the date of August 24, 2008 instead of August 25, 2008 as the date of The-Nguyen's U-Haul truck collision with the overhanging tree and branch on Olson PI SW in Findings of Fact No. 2, 6, and 10 and Conclusions of Law No. 2.
2. The trial court erred when it stated in Findings of Fact No. 6 that prior to August 24, 2008, SDOT had received no complaints regarding the tree struck by Mr. Nguyen's truck when Exhibit 17 shows a tree inventory from 01/19/1992 showing a branch defect.
3. The trial court erred when it stated in Findings of Fact No. 8 that there is no evidence on the condition of the tree in question that would confer constructive notice of a danger to vehicles using Olson PI SW.
4. The trial court erred when it stated in Findings of Fact No. 10 that no act or omission of the City of Seattle or its employees or agents was a cause in fact of the accident of August 24, 2008 (sic).
5. The trial court erred when it stated in Findings of Fact No. 11 that the manner in which SDOT maintains Seattle's street trees does not

represent a failure of ordinary care; The trial court also erred in misidentifying No. 11 as a Finding of Fact instead of a Conclusion of Law.

6. The trial court erred when it stated in Conclusions of Law No. 1 that the City of Seattle did not breach its duty to maintain Olson Pl SW in reasonably safe condition for ordinary travel.

7. The trial court erred when it stated in Conclusions of Law No. 2 that no act or omission of the City of Seattle was a proximate cause of the accident of August 24, 2008 (sic).

8. The trial court erred when it stated in Conclusions of Law No. 3 that judgment in favor of the City of Seattle shall be entered forthwith, and erred in Conclusions of Law No. 4 that judgment should be entered for defendant City of Seattle dismissing all of plaintiff's claims in this action with prejudice.

9. In addition the trial court erred in denying Mr. Nguyen's motion to strike the City of Seattle's defense of lack of actual or constructive notice entered on July 6, 2012.

10. In addition, the trial court erred in finding that the City of Seattle did not have actual notice or constructive notice of the tree encroaching into the roadway.

11. In addition, the trial court erred in finding the City of Seattle did not breach its duty to exercise ordinary care to inspect and maintain the trees on Olson PL SW in a reasonably safe condition for ordinary travel on the roadway.

12. In addition, the trial court erred when it did not make a finding that the City of Seattle breached the standard of care set out in SMC 15.42.010 and SMC 15.42.020.

B. Issues Pertaining to Assignment of Error

1. Should the City of Seattle be allowed to plead the defense of lack of notice for the first time in their trial brief one week before trial after not pleading the defense in their answer, having avoided answering Nguyen's interrogatory question "are there defenses" and answering defenses of failure to mitigate and negligence of Nguyen in other interrogatory questions? (Assignment of error 9, and also assignments of error 2, 3, 4, 5, 6, 7,)

2. The City of Seattle had numerous complaints along Olson Pl SW of down trees, low hanging tree branches, a metro bus damaged by a low hanging branch, vehicles hitting trees, and branches blocking lanes in the roadway in the years prior to Mr. Nguyen's rented U-Haul truck colliding with the overhanging tree. The trees were of the same variety and planted at the same time as the tree at issue in this case. Did the City of Seattle

have actual notice or constructive foreseeable notice of the tree at issue encroaching into the roadway, when other trees of the same variety and age along Olson PL SW encroached into the roadway in the years prior to the collision, and when the Seattle Department of Transportation which maintains the roadway and trees along Olson PI SW took photographs of the tree at issue leaning toward the roadway one year prior to the collision, and when the City of Seattle planted the tree at issue? (Assignment of error 3, and also assignments of error 4, 5, 6, 7, 9, 10, 11, 12)

3. The City of Seattle did not have an inspection or maintenance program to prevent trees from encroaching into their well-traveled roadways. The City of Seattle relied entirely on complaints from the public and travelers of their roadways to address maintenance of its trees. Is the City of Seattle's manner of maintaining its trees, as an artificially created condition planted by the City of Seattle along its roadways congruent with the common law duty to exercise ordinary care to inspect and maintain its trees to prevent its trees from intruding into its roadways in order to keep its roadways reasonably safe for ordinary travel? (Assignment of error 5 and 6, and also assignment of error 7, 8, 9, 10, 11, 12)

4. Did the City of Seattle breach its duty to maintain Olson PL SW in a reasonably safe manner for ordinary travel when the City will only

maintain its roadways after a complaint from the public or roadway traveler or after a roadway traveler such as Mr. Nguyen collides with a tree encroaching into the roadway and when an inspection would have alerted the City of Seattle of the danger? (Assignment of error 5 and 6, and also assignment of error 7, 8, 9, 10, 11, 12)

5. The standard of care for maintaining trees along a city public roadway is defined in SMC 15.42.010 and SMC 15.42.020. The City of Seattle shall keep its trees trimmed to a height of fourteen feet (14') above the roadway. Did the City breach its standard of care to The-Anh Nguyen when they failed to keep its tree trimmed to a height of fourteen feet (14') above the roadway as required by SMC 15.42.010 and SMC 15.42.020? (Assignment of error 10, 11, 12 and also assignment of error 3, 4, 5, 6, 7, 8, 9)

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the Findings of Fact and Conclusions of Law and Judgment entered by King County Superior Court Judge Carol A. Schapira in favor of respondent City of Seattle on liability.

B. PLEADINGS AND PROCEEDINGS

On January 13, 2011, The-Anh Nguyen (hereafter Nguyen) filed a Summons and Complaint against the City of Seattle (hereafter City). CP

1-6. On April 29, 2011, City Answered and plead Affirmative Defenses. CP 7-9. City did not plead “lack of notice” as an affirmative defense or defense in their Answer. *Id.* On May 30, 2012, the court granted Nguyen’s motion to amend the complaint and Nguyen filed the Amended Summons and Complaint on June 1, 2012. CP 39-43. On June 19, 2012, City filed their Answer & Affirmative Defenses to the Amended Complaint. CP 167-169. The subsequent Answer & Affirmative Defenses to the Amended Complaint did not plead “lack of notice” as a defense or an affirmative defense. *Id.*

On May 18, 2012, Nguyen filed and noted a Summary Judgment Motion on Liability alleging the City breached their duty of care to Nguyen under SMC 15.42.010 and SMC 15.42.020 by failing to keep the tree branch trimmed to a height of fourteen feet (14’) above the roadway which caused the collision with Mr. Nguyen’s rented U-Haul truck. CP 10-33. City responded alleging as a disputed fact that Nguyen left the roadway first and then struck the tree. CP 44-53; Lack of Notice of an overhanging tree was not pled or argued in the City’s Response. CP 44-53. The court denied the Motion for Summary Judgment on Liability. CP 165-166. However, in the Findings of Fact at the conclusion of trial, the trial court Judge Schapira found the top of the cargo box of Nguyen’s rented U-Haul cleaved the overhanging tree where the tree and branch connect

and then left the roadway. CP 506-509. The trial court found Nguyen did not drive negligently. CP 506-509.

On June 25, 2012, Mr. Nguyen filed his Trial Brief alleging the City breached their duty of care and violated SMC 15.42.010 and SMC 15.42.020 by failing to maintain the tree branch to fourteen feet (14') above the roadway. CP 179-192. On June 25, 2012, the City filed their Trial Brief and for the first time alleged "lack of notice" of a defect in the tree. CP 175-178. The City did not disclose in any discovery responses "lack of notice" as a defense or affirmative defense. RP Vol. IV, 528:10-25, 529:1-6. On June 26, 2012, Nguyen filed a Motion in Limine to strike the City's defense or affirmative defense of "lack of notice". CP 198-208. On Friday, July 6, 2012 the City filed their response to Nguyen's motion to strike the defense of "lack of notice". CP 529:7-8. The City did not properly serve Nguyen with their Response. CP 529:10-25, 530:1-25. On Monday, July 6, 2012, the last day of trial, the trial judge denied Nguyen's motion to strike the defense of "lack of notice". CP 554:5-7. On July 6, 2012, Judge Schapira found the City did not have actual or constructive notice of the overhanging tree and held the City had no liability. RP Vol. IV, 647:10-14. However, Judge Schapira also found Nguyen sustained substantial damages and made a finding on damages. RP Vol. IV 649:13-

650:7. If the findings on liability are overturned, a retrial will not be necessary. RP Vol. IV, 650:8-15.

Further the trial court incorporates its oral rulings at the end of trial and at presentation hearing of the Findings of Fact and Conclusions of Law to the written Findings of Fact and Conclusions of Law, and any conclusions of law more properly characterized as a finding of fact is adopted as such, and any finding of fact more properly characterized as a conclusion of law is adopted as such. CP 506-509.

The trial court denied The-Anh Nguyen's Motion for Reconsideration on Liability. CP 460-494, CP 537-538.

C. STATEMENT OF FACTS

On August 25, 2008 at approximately 2:25 p.m. the plaintiff The-Anh Nguyen was driving on Olson Place Southwest (hereafter Olson Pl SW) in Seattle, Washington in a rented 1997 Ford U-Haul truck with an eleven foot (11') high cargo box above the passenger cab. RP Vol. IV, 638:16-19, RP Vol. III. 427: 12-25, 481:1, RP Vol. II, 143:20-23, RP Vol. II, 332:10.

Olson Pl SW is an arterial street with two northbound lanes and two southbound lanes and a center turn lane. CP 506-509. Mr. Nguyen was driving the rented U-Haul truck straight downhill at approximately 25 to 30 miles-per-hour in the outside curb lane. RP Vol. IV, 638:17-19. Mr.

Nguyen traveled with two passengers in the cab of the truck. RP Vol. 639:22-25. Robert Liem was in the passenger seat next to the passenger door. Id.

As Mr. Nguyen drove straight, the top passenger side corner of the cargo box struck and intersected with the overhanging tree planted along Olson Pl SW. RP Vol. IV, 640:5-10. The top front part of the cargo box was substantially damaged and similar to a can opener cleaved the tree and separated the overhanging branch from the trunk. RP Vol. IV, 642:4-9. The collision uprooted the tree from the ground and forced the U-Haul truck to veer to the right and off the roadway. RP Vol. IV, 640: 21-25, 641:1-5. The collision occurred in the 9200 block of Olson Pl SW. RP Vol. III, 361:25, 362:1-5, 427:12-25, 428:1.

The U-Haul truck did not leave the roadway prior to the top front of the cargo box striking the tree. RP Vol. IV, 647:6-9, 646:2-4.

After the impact, the wheels of the U-Haul truck went up onto the curb 30 feet beyond where the cargo box intersected the tree and traveled 40 feet in an arc on the planting strip before the back bumper nicked another tree and reentered the roadway. RP Vol. IV, 640:5-10.

Robert Liem was in the right-side passenger seat of the U-Haul truck. Mr. Liem did not notice anything unusual about Mr. Nguyen's driving. RP Vol. IV, 640: 1-3, 643:3-7. Mr. Liem would have noticed if

Mr. Nguyen was driving close to the curb. RP Vol. IV, 643:3-7. Mr. Liem heard a loud noise coming from above his head. RP Vol. IV, 639:25, 640:1-3. Mr. Nguyen was driving fine prior to the collision. Id.

Close to the location where the top of the cargo box catches the tree and produces the cleaving, the cleaved branch from the tree laid over twenty feet (20') across the roadway. RP Vol. IV, 643:14-19. The lanes of the northbound roadway measured 23 feet. Id.

The tree was knocked down when the top of the U-Haul cargo box cleaved the tree. CP 506-509. The tree trunk was approximately 20 inches in diameter. RP Vol. III, 373:12-20.

Perhaps only 6 inches or a foot of the top of the cargo box cleaved the tree. RP Vol. IV, 646:2-4. There were no marks along the vertical side of the cargo box. RP Vol. IV, 645:25, 646:1-5.

The downed tree branch extended over the sidewalk beyond the planting strip. RP Vol. IV, 646:6-12.

The tree trunk was cut away from the root ball of the tree and taken away with the tree branch by the City of Seattle Department of Transportation. RP Vol. IV, 640:2-7; CP 506-509. The root ball was pushed back into the ground. Id.

The court did not fault Mr. Nguyen for his driving. RP Vol. IV, 646:22. By a preponderance of the evidence, Mr. Nguyen did not turn into

the tree leaving the roadway. RP Vol. IV, 647:6-8. The court heard testimony of the examined photographs taken at the time of the accident and at the scene of the accident in exhibits 1 through 13 and examined photograph exhibit 15 taken after the collision. RP Vol. III, 352:20 - 359:3, 360:24 - 365:14.

Exhibit 50 is two (2) photographs of the tree at issue taken by the City of Seattle Department of Transportation one year prior to the accident; the photographs show a definite lean to the tree. RP Vol. IV, 642:15-22.

Accident reconstruction expert Steven Stockinger visited the site of the collision, examined the tree trunk root ball pushed back into the ground and its alignment with the other trees in the area, examined Google street views prior to the collision and examined Exhibit 50 and testified that the tree was leaning into and overhanging the roadway. RP Vol. III, 351:9 – 25, 352: 1-10; 434: 19 – 435: 18.

Exhibit 45 shows and Nolan Rundquist testified to incidents reported along Olson Pl SW: beginning in 6/8/99 with a tree uprooted from a car accident, 10/27/99 tree in roadway and other large branches down in the area, 4/24/00 low hanging branches in roadway, 8/21/00 tree down blocking both southbound lanes, 6/29/02 tree down, 9/23/03 tree branch damaged metro bus hanging low over street, 3/30/04 vehicle

accident tree blocking, 5/30/04 right lane tree hanging down, 3/5/05 tree down vehicle accident, 4/28/06 truck ran into tree and knocked down over sidewalk, 7/1/06 tree hit and has gouge out of it, 12/20/06 tree down blocking southbound on Olson and Myers, 2/10/08 tree down due to car accident, 8/25/08 large tree down and blocking eastbound. RP Vol. III, 469:18 – 478:25; See Exhibit # 45.

Mr. Rundquist also testified the City did not have a plan in place to inspect the tree in 2008 or prior and relied only on citizen complaints to inspect and maintain the trees. RP Vol. III, 477:8-14. The entire stretch of Olson PL SW, in the area of the collision, was planted by the City in 1976 with same variety of tree, the Marshall Seedless Ash. RP Vol. III, 476:2-10.

IV ARGUMENT

A. Standard of Review

Issues of law and corresponding conclusions of law are reviewed to determine whether the correct legal standard was applied; such review is de novo. *Rasmussen v. Bendotti*, 107 Wash.App. 947, 954, 29 P 3d 56 (2001). Statutory interpretation is a legal question which is reviewed de novo. *Landmark Development, Inc. v. City of Roy*, 138 Wash.2d 561, 569, 980 P.2d 1234 (1999).

Court of Appeals reviews a trial court's fact-based rulings for abuse of discretion. If the trial court's ruling is based on an interpretation of the law, Court of Appeals reviews that decision de novo. *State v. Nemitz*, 105 Wash. App. 205, 19 P.3d 480 (2001).

The reviewing court will find an abuse of discretion “when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993); *State v. Michielli*, 132 Wash.2d 229, 240, 937 P.2d 587. A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995). A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view “that no reasonable person would take,” *State v. Lewis*, 115 Wash.2d 294, 298–99, 797 P.2d 1141 (1990)

“In a non-jury trial, an issue or theory not dependent upon new facts may be raised for the first time through a motion for reconsideration and thereby preserved for appellant review”. *Reitz v. Knight*, 62 Wash.App.575, 581, 814 P.2d 1212 (1991), *Newcomer v. Masini*, 45 Wash.App.284, 287, 724 P.2d 1122 (1986).

B. City of Seattle breached SMC 15.42.010 and SMC 15.42.020 when it failed to keep trimmed the tree at issue to over fourteen feet (14') above the roadway causing the collision with Mr. Nguyen's rented U-Haul truck.

1. Duty

Duty may arise from a legislatively created standard of care or from a judicially imposed standard. *Amend v. Bell*, 89 Wash.2d 124, 132, 570 P.2d 138 (1977). “A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence...” *RCW 5.40.050*

2. Seattle Municipal Codes (SMC)

SMC 15.42.010 General Provisions – Trees states:

No one shall plant in any public place any maple, Lombardy poplar, cottonwood or gum, or any other tree which breeds disease dangerous to other trees or to the public health. No one shall allow to remain in any public place ***any tree trunk, limb, branch***, fruit or foliage which is ***in such condition as to be hazardous to the public***, and any such trees now existing in any such planting (parking) strip or abutting street area may be removed in the manner provided in this subtitle for the revocation of permits and removal of obstructions.

SMC 15.42.010 Emphasis added.

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.

SMC 15.42.010 (General provisions trees) and SMC 15.42.020 (Overhanging Trees and Shrubs) when read together protects the public from “any tree trunk, limb, [or] branch... in such a condition as to be hazardous to the public” and states: “[n]o... **trees** shall be allowed to overhang or prevent free use of the... roadway except when *kept trimmed* to a height of ...fourteen feet (14’) above a roadway.

3. Statutory duty

The Court of Appeals in *Skeie v. Mercer Trucking Co., Inc.*, 115 Wash.App 144, 148, 61 P.3d 1207 (2003) defines when a statutory duty arises:

In order for a statutory duty to arise, the statute must (1) protect a class of people that includes the person whose interest was invaded; (2) protect the particular interest invaded; (3) protect that interest against the kind of harm that resulted; and (4) protect that interest against the particular hazard that caused the harm. *Estate of Templeton v. Daffern*, 98 Wash.App. 677, 682, 990 P.2d 968 (2000) (citing RESTATEMENT (SECOND) OF TORTS § 286 (1965)). Breach of a statutory duty is evidence of negligence. *Id.* at 684, 990 P.2d 968.

Id. at 149.

In *Skeie*, The Court of Appeals found as a matter of law the defendant trucking company breached their legal duty to the plaintiff when the defendant violated RCW 46.61.655. The Court of Appeal stated:

RCW 46.61.655 protects all who travel on public roads against injury from improperly secured loads that fall from vehicles. Mr. Skeie was a member of the class of people who travel on public roads. ****1210** He was also injured by an improperly secured load of cement blocks that fell upon him... the statute was designed to protect Mr. Skeie from the particular hazard that occurred.

Id.

Statutory interpretation is a legal question which is reviewed de novo. *Landmark Development, Inc. v. City of Roy*, 138 Wash.2d 561, 569, 980 P.2d 1234 (1999). In this case, ordinance SMC 15.42.010 and SMC 15.42.020 are designed to protect the public using the roadways from hazardous conditions caused by trees overhanging the roadways. Here as in *Skeie*, Mr. Nguyen is a member of the class of people who travel the public roadways. He was injured by an improperly low hanging tree over the roadway and the ordinance was designed to protect Mr. Nguyen from the particular hazard that occurred, striking an overhanging tree above the roadway.

The trees along Olson PL SW were planted by the City, considered to be City-owned, and are the responsibility of the City to maintain. RP Vol. III, 468:13-20. The findings of fact are that the top of Mr. Nguyen's

U-Haul cargo box cleaved the low overhanging tree above the roadway. RP Vol. IV, 640:5-10. Mr. Nguyen was injured by the collision. RP Vol. IV, 649:6-16. The specifications of the height of the U-Haul cargo box was eleven feet (11').RP Vol. IV, 638:16-19. Mr. Nguyen was driving without fault on the roadway and did not turn into the tree leaving the roadway. RP Vol. IV, 646:22, 647:6-8.

Here as in *Skeie*, the court should find **as a matter of law** that the defendant City of Seattle breached their legal duty and standard of care to Mr. Nguyen.

C. City of Seattle with an affirmative duty to trim its trees to fourteen feet (14') above the roadway cannot remain passive until an overhanging tree on its roadway causes a motor vehicle collision with Mr. Nguyen

In *Argus v. Peter Kiewit Sons' Company*, 49 Wash.2d. 853, 307 P.2d 261 (1957) our Supreme Court outlined the reasonable care or due care of a contractor once a duty has been established. The defendant construction company had an affirmative duty to grade a graveled detour roadway for safe use by the public. The plaintiff motorcyclist was injured due to a depression between the gravel and raised paved roadway. The defendant attempted to raise no actual or constructive notice of a defect 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.

In this case the City of Seattle had an affirmative duty to keep trees over the roadway **trimmed** to fourteen feet (14') above the roadway. *SMC 15.42.020*. The City remained passive for seventeen (17) years until Mr. Nguyen's U-Haul collided with an overhanging tree on Olson PI SW. RP Vol. III, 476:2-10, 477:2-14, 468: 21-25, 469:1-3. And as in *Argus*, the city is attempting 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, the City had a duty to anticipate the development of a dangerous condition of the overhanging tree and guard against it by trimming its trees. In the proper exercise of due care, the City is chargeable with knowing what might reasonably be expected to happen when the City has prior knowledge of overhanging branches on Olson PI SW. RP Vol. III, 469:18 – 478:25. As in *Argus*, the City cannot avoid liability as a matter of law by claiming "lack of notice".

D. The City of Seattle's Implied Common Law Duty to Inspect its Trees

The City admitted it planted the trees along Olson PL SW and that it assumed the responsibility of the maintenance of the trees. RP Vol. III, 468:13-20. For the limited purposes of the trees the City has planted, they assume the role of the possessor of land adjacent to a public roadway. In *Curtis v. Lein*, 169 Wash.2d 884, 239 P.3d 1078 (2010), the Supreme Court outlined a landowner's duty to an invitee:

According to premises liability theory, a landowner owes an individual a duty of care based on the individual's status upon the land. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash. 2d 121, 128, 875 P.2d 621 (1994). A tenant is an invitee. *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wash.2d 847, 855, 31 P.3d 684 (2001). This court has adopted the view of the Restatement (Second) of Torts § 343 as to a landowner's duty of care to an invitee.

[A] landowner is subject to liability for harm caused to his [invitees] by a condition on the land, if the landowner (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 tenants; (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 the tenant against danger.

Mucsi, 144 Wash.2d at 855–56, 31 P.3d 684 (citing Restatement (Second) of Torts § 343 (1965)). “**Reasonable care requires the landowner to inspect for dangerous conditions, “followed by such repair, safeguards, or warning as may be reasonably necessary for [a tenant's] protection under the circumstances.”**”

Id. at 856, 31 P.3d 684 (alteration in original) (quoting Tincani, 124 Wash.2d at 139, 875 P.2d 621 (quoting Restatement, *supra*, § 343 cmt. b)).

Curtis at 890.

In this case, the City of Seattle admitted that at the time of the accident and collision, it did not have a program to inspect its trees. RP 477:2-12. As such, the City breached its implied common law duty to inspect the trees it planted next to its roadways for dangerous conditions. *Curtis* at 890. And the City breached its statutory duty to actively keep its trees trimmed to fourteen feet (14') above the roadway. *SMC 15.42.020*. Regular inspections and trimming of the trees along Olson Pl SW would have prevented the collision with Mr. Nguyen's U-Haul.

E. Res Ipsa Loquitor: Inference of City of Seattle's Negligence

In a recent Supreme Court decision in the state of Washington, the Court stated *res ipsa loquitor* was properly applied in premise liability cases. In *Curtis v. Lein*, 169 Wash.2d 884, 239 P.3d 1078 (2010), a tenant who suffered injuries after falling through the property owners' wooden dock after a step gave way brought a negligence action against the property owner. **The dock was destroyed shortly after the incident.** The Supreme Court held that:

(1) tenant could rely upon *res ipsa loquitor* 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.

In *Curtis*, the landowner destroyed the dock shortly after the incident, so there was no evidence of the dock's condition at the time of the accident. The plaintiff invoked res ipsa loquitur to fill in the evidentiary gaps caused by the dock's destruction. The Supreme Court allowed the plaintiff to use res ipsa loquitur to raise the inferences of the owner's negligence of the maintenance of the dock.

In the present case, the tree was destroyed immediately after the collision. RP Vol. IV, 640:2-7; CP 506-509. Mr. Nguyen did not have an opportunity to look at the tree for discoverable defects. Here as in *Curtis*, the elements of ipsa loquitur apply: (1) the accident is of a type that would not ordinarily happen in the absence of negligence because general experience counsels that a properly maintained and trimmed tree would

prevented the tree dangerously overhanging the roadway and prevented the collision with the vehicle; (2) there is no evidence that the tree and roadway was not in the exclusive control of the City; and (3) it is uncontested that Mr. Nguyen himself did not contribute in any way to the accident. Therefore *res ipsa loquitur* applies in this case.

F. City of Seattle breached its common law duty to prevent its trees, an artificially created condition, from overhanging the roadway and colliding with Mr. Nguyen's rented U-Haul

The 1991 Supreme Court decision in *Hutchins v. 1001 Fourth Ave. Assocs* reiterated the proposition that a person in possession of land may owe a duty to others outside the land on the abutting highways:

A possessor of land owes a common law duty 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...

Hutchins v. 1001 Fourth Ave. Assocs., 116 Wash.2d 217, 220, 222, 802 P.2d 1360 (1991) (Emphasis added).

The Court of Appeals in *Rosengren v. City of Seattle*, 149 Wash.App 565, 205 P.3d 909 (2009) defines trees planted by the landowner as artificial conditions as states below:

Restatement (Second) § 368 addresses liability for artificial conditions:

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 bodily harm thereby caused to them...

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

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.** *Restatement (Second) of Torts 363 cmt b*

Rosengren at 574 (Emphasis added and deleted).

The Supreme Court in *Hutchins* reiterates that “a possessor of land owes a common law duty to prevent artificial conditions on his land from being unreasonably dangerous to highway travelers.” *Hutchins* at 220. And the Court of Appeals in *Rosengren* defines planted trees as an artificial condition created by the landowner and reaffirms the duty above as stated in the Restatement of (Second) of Torts holds (although discussing a sidewalk) that the “landowner has a **duty to exercise reasonable care** that the trunks, branches, or roots of trees planted by them adjacent public” highway “do not pose an unreasonable risk of harm to” the public travelers. *Rosengren* at 574.

The City planted the trees along Olson Pl SW. The City breached its duty to exercise reasonable care in common law duty to Mr. Nguyen to prevent the artificial condition it planted from becoming unreasonable dangerous to highway travelers such as Mr. Nguyen. *Hutchins* at 222.

G. The City of Seattle had constructive notice of overhanging trees intruding into the roadway on Olson Pl SW

What will constitute constructive notice will vary with time, place, and circumstance. *Albin v. National Bank of Commerce of Seattle*, 60 Wash.2d 74, 375 P.2d 487 (1962). In *Albin*, occupants of an automobile were injured by a falling tree during a windstorm along a mountainous county road and brought suit against the county and other parties. The Court held that there was no evidence the county had actual knowledge or constructive knowledge that the tree that fell was any more dangerous than any other mountain trees. As a standard for constructive notice, the Court in *Albin* stated “what will constitute constructive notice will vary with time, place, and circumstances” *Id.* at 489.

The present case is substantially distinguished from *Albin*. In this case, the City planted the trees along the roadway on Olson Pl SW in 1976. RP Vol. III, 468:13-20, 396:17-21, 373:12-20. The planted trees are Marshall Seedless Ash (Red/Green) Ash and considered relatively fast-growing. RP Vol. III, 476:1-12. The roadway maintained by the City

is a busy five lane arterial that leads into Highway 509 with a thirty to forty foot drop off to the right of the northbound lanes. CP 506-509, RP Vol. III, 365:4-14. The City assumed the responsibility to maintain the trees as is the duty of the landowner adjacent to a public roadway. RP Vol. III, 468:11-22. The City had actual knowledge of other trees along Olson Pl SW, of the same variety as the tree at issue and planted by the City at the same time as the tree at issue, having low hanging branches, encroaching into the roadway and colliding with the top of and damaging a Metro bus, and vehicles colliding with trees along Olson PL SW for unknown reasons. RP Vol. III, 476:2-12, 470:12-478:15. And the City had actual photographs of the tree at issue leaning toward the roadway. RP Vol. IV, 642:15-22. What the City did not have was any maintenance or inspection program in place to trim and maintain the trees at the time Mr. Nguyen collided with the City tree overhanging the roadway. RP Vol. III, 478:1-25.

The following excerpts from the testimony of the City of Seattle arborist Nolan Rundquist highlights that the City did not have any inspection or maintenance programs or schedules for the trees along Olson Pl SW and that there's no indication at all that the City did any type of inspections or maintenance on Olson Pl SW to assure the public safety for those that are traveling on the roadway at the time of Mr. Nguyen's

August 25, 2008 collision with the overhanging tree in the 9200 block of Olson Pl SW and resulting in injury. RP Vol. III, 361:25, 362:1-5, 427:12-25, 428:1.

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16 Q. Now, earlier today I had you go through and take a look at
17 a series of records.
18 MR. HEMINGWAY: And we're at Plaintiff's exhibit number?
19 THE CLERK: Plaintiff's Exhibit 45 is marked.
20 THE COURT: Thank you.

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12 Q. (By Mr. Hemingway) This is a stack of all of the
13 maintenance records and everything that's been provided by
14 the City of Seattle. As far as you're aware, from 1999
15 all the way up to --
16 A. Yes, this --
17 Q. -- August 25th, 2008 --
18 A. 2008. Yes, this is a -- I would confirm that these were
19 service requests that are issued out by our street
20 maintenance dispatch.
21 Q. Now, on the first one, that was on June 8th, 1999. It
22 says "A tree was uprooted from a car accident. Needs to
23 be picked up." Is that right, the first record?
24 A. That's correct.
25 Q. Okay. It doesn't say -- have anything to say how that

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1 tree was knocked down or what caused that tree to be
2 knocked down. No notice of that at all; is that right?
3 A. That's correct. It just says a tree was -- involved in a
4 car accident was uprooted.
5 Q. And then in the next record, it has "Tree in the roadway
6 and other large branches down." And that's on
7 October 27th, 1999; is that right?
8 A. That's correct.

...
18 Q. And then if we look at the next record, which is
19 April 24th, 2000, it says that you had a "Citizen
20 complaint of low-hanging branches on both sides of the
21 street." Is that correct?

22 A. That's correct.
23 Q. And then there's no maintenance records or anything that's
24 been attached as I have requested on whether or not the
25 City did anything about that; is that correct?

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1 A. Yeah. That's correct.

2 Q. And then there's another record on August 21st, 2000.

3 "Tree down. Blocking both southbound lanes." Is that
4 correct?

5 A. That's correct.

6 Q. And there's no notation here on how that tree got knocked
7 down or whether the City followed up and -- and looked at
8 it or did any maintenance at all afterwards; is that
9 right?

10 A. Yes. Basically, it's a report that the tree was knocked
11 down.

...

24 Q. And then we move on to September 23rd, 2003. And it -- it
25 acknowledges that a tree branch was damaged by a Metro bus

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1 from -- well, from a low-hanging -- low -- hanging low
2 over a street. Is that right?

3 A. That's correct.

4 Q. And it says that they came out and they cut the branch and
5 took it to the West Seattle yard, and that was completed.
6 But there's nothing in here that says that they inspected
7 the area for other trees that were down in the area of the
8 9400 block of Olson Place Southwest or if they needed to
9 do any other maintenance to that area; is that right?

10 A. Yeah. That's correct.

...

24 Q. (By Mr. Hemingway) So if we go back a couple pages, you
25 had a citizen complaint on April 24th, 2000?

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1 A. Okay.

2 Q. And that between April 24th, 2000, and the tree branch
3 damaging the Metro bus hanging low over a street on
4 September 23rd, 2003, there's nothing in the record that
5 says that the City of Seattle took any type of inspection
6 or maintenance on Olson Place Southwest to avoid the Metro
7 bus colliding with the tree branch?

8 A. Well, the -- the citizen complaint is in the 5999 block,
9 and the incursion with the Metro bus is in the 9400 block.
10 So I would -- I mean, two blocks away. I have no idea
11 why -- you know, whether we received any complaints in
12 regards to low branches in the area that the Metro bus
13 was.
14 Q. So you're saying because it's two blocks away, they
15 wouldn't have inspected the roadway for the entire --

...

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13 THE COURT: Pardon me for rolling my eyes. I mean, this
14 doesn't say -- does it? -- when inspection was done or not
15 or --

16 THE WITNESS: No, it doesn't. It's just that that's
17 typically -- that would be procedure that if an emergency
18 laborer went out -- it says "EMGC Labor Support." So
19 that's essentially a emergency laborer. It's not a -- any
20 type of a tree trimmer or anything, a professional. So
21 someone went out with a truck and took a branch that was
22 on the ground and loaded it onto the truck and hauled it
23 off. So there would be no -- no call for an inspection.

24 Q. (By Mr. Hemingway) Okay. Now, the trees that are planted
25 on Olson Place Southwest, are they all the same kind of

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1 tree?

2 A. Currently, no. But the initial planting back in 1976 was
3 Marshall Seedless Ash.

4 Q. Okay. And so in the 9400 block and the 9200 block, that's
5 the type of tree that's there?

6 A. That's correct.

7 Q. And they were both planted about the same time, the 9400
8 and the 9200 block?

9 A. Yes. The entire -- the entire stretch of Olson Place
10 was -- was planted initially in 1976.

11 Q. And that type of tree, is it a fast-growing tree?

12 A. Reasonably fast growing.

13 Q. And then if we just move two pages -- if you skip two
14 pages to the May 30th, 2004, record.

15 A. Okay.

16 Q. And here we have that a branch was hanging down and it's
17 too low -- too high and he can't cut it, but it's a notice

18 of a -- in the right lane of "Tree hanging down." Is that
19 right?

20 A. That's correct.

...

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2 Q. And all through these records that I've read to you,
3 there's nothing that -- that says that the City had
4 inspected the roadway or had made a maintenance plan for
5 that roadway for any low-hanging branches; is that
6 right?

7 A. That's correct.

8 Q. And again, to reiterate that question that I had before.
9 And the City didn't have an official program at all back
10 in August of 2008 that had to do with inspecting trees
11 that may have low-hanging branches or cause a safety issue
12 to the public using the roadway; is that correct?

13 A. That's correct. We dealt on basically citizen
14 complaints.

15 Q. So if we go to the next page, we have something in
16 July 1st in 2006. And this is the 9400 block of Olson
17 Place Southwest. And then it says "A tree hit and has a
18 gouge out of it." Is that right?

19 A. That's correct.

...

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1 Q. And there's nothing in the record about any inspection or
2 of you or maintenance to the 9200, 9300, 9400, 9000, 9100
3 block of Olson Place Southwest; is that right?

4 A. There's no indication.

5 Q. Okay. And then we have a February 10th, 2008. And then,
6 again, a tree down due to a car accident; is that right?

7 A. Okay. Yes.

8 Q. Okay. And that's the 9400 block of Olson Place
9 Southwest?

10 A. That's correct.

11 Q. And then finally we have the August 25th, 2008, record
12 that was involved with Mr. The-Anh Nguyen. And this says
13 the 9000 block of Olson Place Southwest. And it says,
14 "Large tree down and blocking eastbound lanes." Is that
15 right?

16 A. That's correct.

17 Q. And in between -- in any of these records that I've read,
18 there's no indication at all that the City did any type of
19 inspection or maintenance on Olson Place Southwest to
20 assure public safety for those that are traveling on the
21 roadway; is that right?
22 A. There's -- there's no indication here that there was an
23 inspection scheduled, that's correct.
24 Q. Okay. I don't have any further questions.
25 THE COURT: Thank you.

Excerpts from RP Vol. III, 469:16 through Vol.III:478:25. Exhibit 45 was entered into evidence on July 9, 2012. RP Vol. IV, 505:11-22.

Constructive notice arises if the condition has existed for such a period of time that the government entity should have known of its existence by the exercise of ordinary care. *Nibarger v. Seattle*, 53 Wn.2d 228, 332 P.2d 463 (1958). The trees planted along Olson Pl SW in the 9000 to 9400 block were planted in 1976. RP Vol. III, 476:2-12. It is reasonably foreseeable that if numerous trees in the same area of Olson Pl SW and planted at the same time have low branches overhanging over the roadway, trees with vehicle collisions, and a Metro bus damaged by an overhanging tree, the City should have known its trees along Olson Pl SW are a hazard to the travelers on the roadway and need to be addressed with ordinary care. At a minimum the exercise of ordinary care would require the City to inspect and maintenance its trees to prevent its trees from continuing to overhanging Olson Pl SW and would have prevented Mr. Nguyen's U-Haul from colliding with the overhanging tree in the 9200

block of Olson Pl SW. In this case, the City breached their “duty to exercise ordinary care” in the maintenance of its public streets to keep them reasonable safe for ordinary travel. *WPI 140.01*.

Breach of duty is based upon the totality of the circumstances. *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). Here, the City had no inspection or maintenance program for its trees along Olson Pl SW, a five lane arterial leading to and from Highway 509. The tree that was uprooted and knocked down by the collision with Mr. Nguyen’s U-Haul had a base that was approximately twenty inches (20”) across and the cleaved branch extended over twenty feet (20’) across the roadway and back over the planting strip and sidewalk. RP Vol. III, 373:12-20, Vol. IV, 643:14-19. To the right of the northbound lane Mr. Nguyen was traveling in was a thirty to forty foot drop off. In the 9000 block to 9400 block of Olson Pl SW where the collision took place, the same variety of tree was planted in 1976 and in the ten (10) years prior to the collision there were numerous incidents with the trees overhanging the roadways, collisions with vehicles, an uprooted tree, and a collision damaging the top of a Metro bus. The City breached its duty to exercise reasonable care to keep Olson Pl SW reasonably safe for ordinary travel. And the City breached its duty to keep its trees along Olson Pl SW trimmed to a height of

fourteen feet (14') above the roadway as required by Seattle Municipal Code SMC 15.42.020 and to prevent the public from encounter a hazard as required by Seattle Municipal Code SMC 15.42.010. Based upon the totality of the circumstance, the City breached its duty of care to keep the roadway reasonably safe for Mr. Nguyen's travel on Olson Pl SW.

H. City of Seattle waived its defense of lack of notice when it did not plead lack of notice as a defense under CR 8(c)

CR 8(c) states in part that "In pleading to a preceding pleading, a party shall set forth affirmatively accord... and **any other matter constituting an avoidance or affirmative defense.**" Notice is a matter constituting an avoidance. Failure to plead an affirmative defense constitutes a waiver of the defense. *Lybbert v. Grant County*, 141 Wash.2d 29, 1 P.3d 1124 (2000). Since notice is not an element of the prima facie case of the violation of SMG 15.42.020, the affirmative defense is waived.

The City did not plead notice, whether actual or constructive, as an affirmative defense in their answer to the complaint and then on the eve of trial asserts notice for the first time in their trial brief.

The Supreme Court in *King v. Snohomish County*, 146 Wash.2d 420, 47 P.3d 563 (2002) stated:

We have held that a defendant may waive an affirmative defense if either (1) assertion of the

defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense. Lybbert v. Grant County, 141 Wash.2d 29, 39, 1 P.3d 1124 (2000). See also French v. Gabriel, 116 Wash.2d 584, 806 P.2d 1234 (1991). In Lybbert we explained, "the doctrine of waiver is sensible and consistent with ... our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'" Lybbert, 141 Wash.2d at 39, 1 P.3d 1124 (quoting CR 1). The doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage. Lybbert, 141 Wash.2d at 40, 1 P.3d 1124.

Id at 565.

The City avoided answering the interrogatory question No. 15, "State the general nature of the insurer's defenses to claimant's claim and the basis therefor" by answering, "This question is unanswerable by the City", and held bringing the defense of lack of notice until the eve of trial. RP Vol. IV, 528:10-25, 529:1-6, Also see Exhibit 32. The City also failed to bring the defense of "lack of notice" in the City's Response to Mr. Nguyen's motion for summary judgment on liability. CP 44-53. "The doctrine [of waiver] is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." Lybbert at 40. Here, as in Lybbert, the City should not be allowed to bring "lack of notice" as a defense one week before trial.

The plaintiff has set forth a breach of SMC 15.42.020 which set a standard of care for the City to keep trimmed its trees to a height of fourteen feet (14') above the roadway, and the breach was the proximate cause of the collision and injury to Mr. Nguyen. Therefore a finding of negligence by the City should be found. No other reasonable inference or conclusion can be made other than the tree was overhanging the roadway and the tree was at least three feet (3') below the fourteen foot (14') standard established by SMC 15.42.020. **There should be a finding of breach and negligence as a matter of law.** An affirmative defense of "lack of notice" must be pled in the answer. *CR 8(c)*.

If a finding of negligence based on the common law breach of duty of reasonable care and inferred duty to inspect, and the findings under *res ipsa loquitur* (*Curtis*) and in particular, a breach of a legislatively set standard of care established by ordinance (*SMC 15.42.020 and RCW 5.40.050*) is found in this case, then notice is an affirmative defense must be pled in the answer. The City has waived its defenses of "lack of notice" by not pleading the defense in their Answer.

I. Negligence: unsafe condition caused by City of Seattle's breach of duty to The-Anh Nguyen

To establish negligence a plaintiff must demonstrate: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 127-128, 875 P.2d 621

(1994). Whether a duty exists is a question of law. *Id.* at 128. Existence of a duty is established by common law principles or statutory provisions. Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 653 P.2d 280 (1982).

The Findings of Fact in this case are:

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

CP 506-509, RP Motion Hearing: 16:22-25, 17:1-25, 18:1-25, 19:1-4.

Emphasis added.

The City had a duty in common law to exercise reasonable care and a legislative duty established by ordinance to keep its trees trimmed to a height of fourteen feet (14') above the roadway. *SMC 15.42.020*. By failing to inspect for dangerous conditions of its trees overhanging the roadway, failing to exercise ordinary care of its trees on the property

adjacent to the roadway, and failing to keep its trees trimmed to a height of fourteen feet (14') as required by ordinance, the City breached the common law standard of care and legislatively created standard of care for the maintenance of its trees; the breach was the proximate cause of the collision of Mr. Nguyen's rented U-Haul with the overhanging tree and caused the injuries and damages to Mr. Nguyen. The City's own negligence caused the incident to occur and was the proximate cause for Mr. Nguyen's damages.

V. CONCLUSION

The trial court should not have allowed the City to argue lack of notice because it was not plead and because interrogatories asking for such defenses were not timely answered. This is a question of law so no deference to the judicial decision is required.

As an abuse of discretion, the trial court concluded that the City did not have notice. The City had notice as a matter of law because they planted the tree and by the City's own ordinance had a duty to maintain and to keep the tree trimmed to fourteen feet (14') above the roadway. There was overwhelming evidence that no reasonable Judge could have concluded otherwise.

The trial court erred when it concluded there was no breach of duty. This is a question of law. A de novo standard applies. There was a

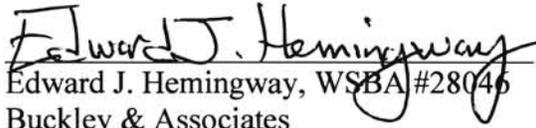
breach of duty, as a matter of law, because the City had no maintenance or inspection program. Further, as a matter of law, the City was required to inspect and maintain. If the City had done this, then, as a matter of law, the accident would not have happened: therefore, there is causation as a matter of law.

The City of Seattle was negligent as a matter of law for failing to keep its tree trimmed to a height of fourteen feet (14') above the roadway. The undisputed findings of fact are that Mr. Nguyen did not leave the roadway prior to the top of the eleven foot (11') cargo box striking the City's overhanging tree and injuring Mr. Nguyen. The City's negligence was the proximate cause to the collision and Mr. Nguyen's damages.

The appellant seeks a finding as a matter of law, that the City of Seattle breached its duty to exercise ordinary care to Mr. Nguyen to keep Olson Pl SW in a reasonably safe condition for ordinary travel, and the breach was the proximate cause of Mr. Nguyen's resulting injury and damages; and therefore this case should be remanded back to the trial court for a judgment in favor of Mr. Nguyen on liability and damages.

DATED this 19th day of February, 2013

Respectfully submitted,



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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE-ANH NGUYEN,

Plaintiff,

-vs-

CITY OF SEATTLE, a governmental entity,

Defendant.

NO. 69263-1-I

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 19 day of FEBRUARY, 2013, he caused a true and correct copy of the following document(s):

I. BRIEF OF APPELLANT

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

Jeffrey M. Cowan	<input type="checkbox"/>	U.S. Mail
Seattle City Attorney	<input checked="" type="checkbox"/>	E-Mail
600 Fourth Avenue	<input type="checkbox"/>	Facsimile
PO Box 94769	<input checked="" type="checkbox"/>	ABC Legal Messenger
Seattle, WA 98124	<input type="checkbox"/>	Electronic Filing

Division I Court of Appeals	<input type="checkbox"/>	U.S. Mail
One Union Square	<input type="checkbox"/>	E-Mail
600 University Street	<input type="checkbox"/>	Facsimile
Seattle, WA 98101	<input checked="" type="checkbox"/>	ABC Legal Messenger
	<input type="checkbox"/>	Electronic Filing

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