100197-5

No. 81075-8-I

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION 1

DEIRTRA WILLIAMS, as Personal Representative of the ESTATE OF DEIDRA L. CLARK; A.M.C., a minor child; DEIRTRA CLARK, a single person; NORMAN DEVOE, a single person; R.E.A., a minor child,

Appellants,

v.

KING COUNTY, a municipal corporation; CANDLEWOOD RIDGE HOMEOWNER'S ASSOCIATION (d/b/a CANDLEWOOD RIDGE/CARRIAGE WOOD HOMEOWNER'S ASSOCIATION), a Washington nonprofit corporation; CANBER CORPORATION, a Washington corporation; ISSAQUAH TREE CARE, a Washington Corporation,

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF PETITIONERS

Petitioners are Deirtra Williams, as Personal Representative of the Estate of Deidra L. Clark, A.M.C, a minor child, Deirtra Clark, Norman DeVoe and R.E.A., a minor child. Petitioners seek review of the Court of Appeal's Opinion which affirmed the trial court's summary dismissal of Petitioners' negligence claims against King County—the negligence of which resulted in Deidra Clark being crushed to death by a fallen tree in front of her four-year-old daughter. The tree that killed Deidra Clark was the *seventh* tree to fall in Petitioners' heavily populated Renton, Washington neighborhood in a matter of months, and the *fourth* tree to fall in a matter of days.

On November 13, 2017, Deidra Clark was driving home through her neighborhood on SE 179th Street, a busy public right-of-way in King County. Deidra's twin sister, Deirtra Clark, was in the front passenger seat. Deidra's four-year-old daughter, A.M.C., was in her child safety seat in the rear driver side seat. As Deidra slowed to make a left turn near her house, a severely diseased black cottonwood tree—that was leaning dangerously over SE 179th Street and had visible signs of decay from the County right-of-way—snapped twelve feet up from the ground. The tree fell completely across the County road and smashed down on top of the vehicle. The impact of the tree killed Deidra. Emergency responders had to use the "jaws of life" to extract Deirtra. Once extricated, Deirtra was intubated and transported to Harborview Medical Center as a full trauma code. She remained in the ICU

for ten days. A.M.C. somehow survived the impact, but she witnessed first-hand the gruesome death of her mother.[1]

King County had a duty to maintain the roadway in a reasonably safe manner. This duty extended to trees falling across County roads upon actual or constructive notice of the dangerous condition posed by the subject tree, or if the dangerous condition was foreseeable. Here, there is substantial evidence of both notice and foreseeability. Such evidence includes the following:

- The tree was leaning dangerously over a public right-of-way in a developed residential area of Renton, Washington;
- The leaning tree had visible signs of disease for years;
- The County knew black cottonwoods were an inherently dangerous species of tree;
- The County was in the immediate vicinity of the subject tree 10 months before the incident responding to *another* fallen cottonwood, but did nothing to inspect the subject tree even though it had visible signs of decay at that time; and
- *Five days before the incident*, the County knew three cottonwood trees fell within blocks of the subject tree, but the County did not inspect those trees to determine why they fell or if there was an issue with cottonwoods in the area.

Notwithstanding these numerous warning signs, the County did nothing. Seemingly ignoring the extensive evidence (much of which is undisputed) presented on summary judgment, the trial court and Court of Appeals improperly analogized this matter to the Supreme Court case of *Albin v. Nat'l Bank of Commerce of Seattle* wherein the plaintiffs presented *no evidence* that "the tree which fell was any more dangerous than any one of

[1] Deidra Clark's other daughter, R.E.A., was not directly involved in the incident.

the thousands of trees which line our mountain roads, and no circumstances from which constructive notice might be inferred." This is not such a case, and the trial court and Court of Appeals' reliance on *Albin* was in error.

Instead, this matter poses the question: how many trees had to fall over roadways in Petitioners' densely populated neighborhood, how many years did this tree have to sit rotting with visible fungal conks, how far did it have to lean over the right-of-way before King County had a duty to act? At a minimum, the evidence presented by Petitioners was sufficient to create genuine issues of material fact as to whether the County had actual or constructive notice that cottonwood trees lining the streets of the neighborhood, including the subject tree, were falling and posed a danger to drivers and pedestrians. Because the Court of Appeals' decision in this matter represents a significant departure from its prior decisions and runs contrary to this Court's decision in *Albin*, the summary dismissal of Petitioners' negligence claims should be reversed.

II. ISSUES PRESENTED FOR REVIEW

1. Whether Petitioners' extensive evidence of actual notice, constructive notice and foreseeability should have been sufficient to overcome summary judgment and presented to the jury as questions of fact.

2. Whether Petitioners' expert's opinions should have been stricken as speculative despite them being grounded in undisputed evidence.

3. Whether, in the event this Court reverses the dismissal of Petitioners' negligence claim, this Court should remand this matter to the

Court of Appeals for a ruling on Petitioner DeVoe's NIED claims.[2]

III. STATEMENT OF THE CASE

A. Deidra Clark Was Killed By a Fallen Tree While Driving on a County Right-of-Way.

On November 13, 2017, Deidra Clark was driving home through her neighborhood in King County, Washington.[3] Deidra Clark's twin sister, Deirtra, was in the front passenger seat of the vehicle. Deidra's four-year-old daughter, A.M.C., was strapped into her child safety seat in the rear driver side seat.[4] As Deidra slowed to make a left turn near her house, a severely diseased black cottonwood tree with clear and obvious signs of decay that was leaning dangerously over SE 179th Street snapped almost in half.[5] The top portion of the tree smashed directly down on top of the car The impact killed Deidra.[6] Deidra's twin sister, Deirtra Clark, suffered serious injuries as a result of the tree fall, including concussion, traumatic brain injury, multiple spinal fractures, and third degree friction burns on her hands and arms (caused by the tree impacting her body), Deidra's daughter, A.M.C., survived the impact of the tree smashing through the vehicle, but she witnessed first-hand the death of her mother and suffering of her aunt in the front seat.[7]

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[2] Petitioners do not include argument on this issue, but merely ask this Court to remand the issue to the Court of Appeals subject to this Court's ruling on the negligence claim.
[3] ¶¶ 4.1-4.6 of 4th Amended Complaint (subject to Motion to Supplement the Record); *see also* CP 107-109.
[4] *Id*.
[5] *Id.*
[6] *Id*.
[7] *Id*.

B. The Cottonwood Was Located in a Well-Developed Residential Neighborhood Along a County Street and at a Metro Bus Stop.

Unlike the county road in *Albin*, the tree that killed Ms. Clark was not located along some remote county road in the mountains. Rather, it was located in the Fairwood neighborhood of Renton at the intersection of SE 179th Street and 159th Ave SE. The stem of the tree originated on a small parcel of land known as "Tract B" immediately adjacent to SE 179th Street. The tree "snapped about fifteen feet up from the ground" and "fell completely across [SE 179th Street] from the south side to the north." The tree "struck and damaged trees on the north side of [SE 179th St]," immediately adjacent to the playground.[8] Survey data reveals that hundreds of vehicles travel SE 179th Street every day.[9] The tree was also located approximately ten feet from Metro Bus Stop No. 59566 ("Bus Stop").

C. The Cottonwood Was Leaning Significantly and Had Visible Signs of Decay For Several Years.

The subject tree was a black cottonwood tree that was 26.2 inches in diameter and approximately 95 feet tall when it snapped. Petitioners' retained certified arborist, Galen Wright, inspected the remaining stem on December 4, 2017. Wright reported the following observations: (1) decayed wood was visible at the break point at the time of the failure, (2) "at least 3 conks of a stem decay fungi were present above 6 feet and visible to anyone who examined the tree"; and (3) he noticed those fungal conks "within minutes" of walking up to the tree. [10] The presence of these fungal conks in

[8] CP 485 (Sheriff's Report).
[9] CP 487-492 (Axle Classification Report).
[10] CP 494. *See also* CP 517 and 515 (Wright Dep. 49:23-50:17; 29:19-21).

three separate locations on the tree were "easily visible" to anyone who looked in the direction of the tree. Wright opined the fungal conks were visible and present on the tree for six to twelve years.[11]

During his inspection, Wright observed the remaining stem leaned to the north toward the right-of-way and the Bus Stop, making the probability of the tree striking the road and other targets obvious. The lean of the tree was significant enough (at least 15-20 degrees) to put the crown and a portion of the stem over the right-of-way.[12] The tree's lean onto the right-of-way is significant because, as Wright testified, any trained individual would have noticed the lean during a basic "ISA Level 1" inspection. The County's arborist, James Kotarski, who is also serving as its expert witness, inspected the remaining stem on December 13, 2017. Kotarski's "inspection" was limited to visually observing the stem for "a few minutes" while standing along SE 179th Street about ten feet away from the stem.[13] Even from this distance, Kotarski observed the fungal conk ***from ten feet away while standing on the King County right-of-way***.[14] Kotarski also agreed with Wright that the tree was leaning north toward SE 179th Street at the time it failed.[15] According to Wright, there were at least *five separate* indicators present before the incident that should have caused the County to examine and remove the tree: (1) the lean over the bus stop

[11] CP 515 and 526 (Wright Dep. 29:6-18; 159:18-23).
[12] CP 519 and 522 (Wright Dep. 65:24-67:5; 92:6-12).
[13] CP 550 (Kotarski Dep. 114:12-21).
[14] CP 550 (Kotarski Dep. 113:12-24).
[15] CP 224 (Kotarski Decl. at ¶ 28).

and SE 179th Street; (2) the fungal conks visible on the lower stem; (3) the species of the tree—black cottonwood—is prone to failures even in non-storm conditions; (4) the visible root decay and bark separation; and (5) the recent cottonwood failure at the same location.[16] Despite these warning signs, the County allowed this leaning and diseased tree to line a County road for years.

D. The County Admits It Was Aware Cottonwoods Are More Susceptible to Rot, Disease, and Failure.

The County had prior knowledge that cottonwoods (known as "weed trees")[17] were inherently dangerous trees that could threaten the public. In fact, Kotarski readily admitted cottonwoods are, by nature, a "short-lived species of tree" that are more susceptible to rot, disease, branch failure, and crown failure.[18] He explained the presence of fungal conks would be *more concerning* to him if located on a cottonwood tree because they are "weaker structurally" and "poor compartmentalizers of disease."[19]

E. The County's Flawed Process for Identifying and Removing Hazardous Trees Relies Primarily on Untrained Individuals.

Instead of having its own trained arborist look for hazardous trees posing a threat to the rights-of-way, the County relies *exclusively* on citizen calls to its "24/7 Road Helpline." Tony Ledbetter, the Operations Manager for the County Roads Services Department, testified the County relies on the "subjective opinion" of untrained members of the public who are

[16] CP 498 (Wright Report).
[17] CP 539 (Kotarski Dep. 52:5-8).
[18] CP 539-540 (Kotarski Dep. 52:9-54:1).
[19] CP 539 (Kotarski Dep. 50:14-52:4).

"driving down the road [who] see something that doesn't look right."[20] If an individual never reports a hazardous tree, the County never inspects or removes the tree. The inherent flaw in the County's process is that those people "driving down the road" are most likely not arborists and may not realize a tree poses a threat.

F. <u>The County Knew Another Cottonwood Fell in Tract B Just Months Before the Subject Incident, But It Did Nothing</u>.

The subject incident was not the first time a cottonwood tree fell in Tract B. On January 20, 2017, less than ten months before the subject incident, *another* leaning cottonwood located in Tract B, approximately 30-40 feet from the subject tree, fell into SE 179th Street.[21] County service records regarding the incident show the County responded to that tree fall.[22] Rather than refer the failed tree to Kotarski for inspection to determine why the tree fell, whether it was diseased, or whether other cottonwoods in the immediate vicinity (including the subject tree) were susceptible to a similar failure onto the County right-of-way, the County did *nothing*. [23] Wright testified that the County's inaction violated a basic tenant of tree risk assessment that when there is a failure, adjacent trees need to be examined to ensure they are not susceptible to a similar failure. [24, 25] Unfortunately, an adjacent cottonwood did experience a similar failure ten months later.

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[20] CP 578 (Ledbetter Dep. 79:14-19).
[21] CP 521 (Wright Dep. 74:17-20).
[22] CP 506-508 (Service Request 18546).
[23] CP 598 (DePriest Dep. 105:5-106:1).
[24] CP 523-524 (Wright Dep. 109:13-25; 116:11-14).
[25] CP 524-525 (Wright Dep. 116:15-24; 117:18-21).

G. The County Knew There Was a Recorded History of Falling Trees Near the Same Location, But It Did Nothing.

Even when the County was aware a specific location had a pattern of repeated tree falls, it did nothing to determine the cause of those failures or whether there was a broader systemic issue.[26] Specifically, in addition to the January 20, 2017 cottonwood tree fall within Tract B, the County was also aware of two other tree fall incidents that occurred at the same intersection near the subject incident. Unfortunately, the County chose not to even dispatch its arborist to investigate those tree falls. On October 16, 2016, a tree fell onto SE Petrovitsky Road, a road Kotarski described as a "major arterial," which was 0.6 miles away from the subject incident.[27] Because that tree had already fallen, it was coded as "Vegetation in Roadway" and the County did not dispatch its arborist. Thus, the County knew nothing about the circumstances of that tree fall.[28] Then, less than four months later, on February 2, 2017, a *second* tree fell across Petrovitsky Road at the *exact same location* as the October tree fall.[29] The County's arborist was never dispatched and has no knowledge regarding what occurred, why it occurred, or whether there was a broader problem along public rights-of-way in the vicinity.[30]

H. The County Knew Three Cottonwoods Fell Blocks From the Subject Tree Five Days Before the Incident, But It Did Nothing.

[26] CP 548 (Kotarski Dep. 106:6-13).
[27] CP 672 (Ledbetter Supp. Dec. at ¶¶ 5 and 6).
[28] CP 613 (Service Request 16964).
[29] CP 615-616 (Service Request 24466).
[30] CP 543-544 (Kotarski Dep. 76:11-79:7).

Just five days before the subject incident, three additional cottonwood trees fell onto the County right-of-way near the intersection of SE Petrovitsky Road and 151st Ave SE (a few blocks from the subject incident) on the evening of November 8, 2017.[31] Those fallen trees were the exact same species of tree that killed Deidra a few days later.[32] The County ignored this incident entirely. Rather than refer the trees to Kotarski, the County simply cleared the fallen cottonwoods from the road and recycled the remains.[33, 34] Although the County was fortunate the cottonwoods that fell on November 8, 2017 did not kill anyone, it was not as fortunate five days later.

IV. LEGAL ARGUMENT

A. The Court of Appeals Erred In Affirming the Trial Court's Summary Dismissal of Petitioners' Negligence Claim.

Decisions on summary judgment are reviewed *de novo*. *McCaulley v. Dep't of Labor & Indus. of Washington*, 5 Wn. App. 2d 304, 424 P.3d 221, 225 (2018) (citing *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 431, 262 P.3d 837 (2011)). Summary judgment is only proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Here, genuine issues of material fact remain as to whether the County was on notice of the dangerous condition at issue, and whether the dangerous condition was foreseeable.

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[31] CP 615-616 (Service Request 24466).
[32] *Id.*
[33] CP 596 (DePriest Dep. 85:1-7).
[34] CP 597 (DePriest Dep. 89:18-90:2).

1. The County Has a Duty to Maintain Its Roadways in a Condition Reasonably Safe for Ordinary Travel.

Washington courts generally hold municipalities to the same negligence standard as private individuals. *Keller v. City of Spokane*, 146 Wn.2d 237, 242–43, 44 P.3d 845 (2002). Here, the County had a duty "to maintain its roadways in a condition safe for ordinary travel." *See Owen v. Burlington N. & Santa Fe R.R. Co*., 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005). This duty required the County to take reasonable steps to correct hazardous conditions that made a roadway unsafe, including hazardous conditions created by roadside vegetation. *Wuthrich v. King Cty*., 185 Wn.2d 19, 27, 366 P.3d 926 (2006).

2. Significant Issues of Fact Exist That Should Have Been Reserved for the Jury.

A county is liable to the users of its roads upon it having notice, either actual or constructive, of the dangerous condition which caused injury, ***or*** if the danger was one the county should have foreseen and guarded against. *Nguyen v. City of Seattle*, 179 Wn. App. 155, 165-166, 317 P.3d 518 (2014). Although the existence of a legal duty is a question of law, "where duty depends on proof of certain facts that may be disputed, summary judgment is inappropriate." *Afoa v. Port of Seattle*, 160 Wn. App. 234, 238, 247 P.3d 482 (2011). Washington courts have repeatedly held that issues of notice and foreseeability are *issues of fact* to be decided by a jury. *Pratt v. Water Dist. No. 79*, 58 Wn.2d 420, 426, 363 P.2d 420 (1961) (actual notice is an issue of fact); *O'Neill v. City of Port Orchard*, 194 Wn. App. 759, 774, 375 P.3d 709 (2016) (constructive notice is an issue of fact);

Iwai v. State, Employment Security Department, 129 Wn.2d 84, 101-102, 915 P.2d 1089 (1996) (whether a dangerous condition was foreseeable is an issue of fact). There is substantial evidence the County had actual and constructive notice of the dangerous condition that killed Ms. Clark or, at the very least, that the County should have foreseen the dangerous condition. This evidence is sufficient to create genuine issues of material fact that preclude summary judgment.

a. Whether the County Was on Actual Notice Is an Issue of Fact.

To establish actual notice, Petitioners must present evidence that the County had actual knowledge of the "unsafe condition." *Pimentel v. Roundup Co*., 100 Wn.2d 39, 49, 666 P.2d 888 (1983). While the County claims to have been unaware that the specific cottonwood that killed Ms. Clark posed a risk, the County *did know* that black cottonwoods lining County streets, including the subject tree, were at heightened risk of failure, *did know* that another black cottonwood within 30-40 feet of the subject tree fell at the same intersection just ten months prior, and *did know* that in 13 months leading up to the incident, at least six trees fell over County roads in the vicinity of where Ms. Clark was killed. The County *knew* that five days prior to Ms. Clark's death, three cottonwoods fell within a few blocks of the subject incident. The County had *actual knowledge* cottonwoods were creating unsafe conditions along public rights-of-way in a well-developed residential neighborhood, yet it chose to ignore that knowledge. This notice goes beyond constructive notice and creates genuine issues of

material fact as to whether the County had actual knowledge of the "unsafe condition" posed by cottonwoods in this neighborhood.

b. Whether the County Was on Constructive Notice Is an Issue of Fact.

At the very least, issues of material fact exist as to whether there was constructive notice. "Constructive notice arises where the defective condition has existed for such time that a municipality in exercising ordinary care would have discovered the defective roadway condition." *O'Neill v. City of Port Orchard,* 194 Wn. App. 759, 773-774, 375 P.3d 709 (2016). What constitutes ordinary (or reasonable) care in a given circumstance is an issue of fact for the jury. *Laudermilk v. Carpenter*, 78 Wn.2d 92, 97, 457 P.2d 1004 (1969). Here, a jury could conclude: (i) the tree was in a dangerous, diseased state for long enough that; (ii) had the County exercised ordinary care, then; (iii) it would have discovered the dangerous condition.

i. The Defect in the Tree Existed for 6-12 Years.

It is undisputed that the defective, dangerous condition existed between six and twelve years before the tree finally failed and killed Ms. Clark. In some cases, the length of time a defect exists alone is sufficient for the court to send the case to the jury. For example, in *O'Neill*, a bicyclist brought a negligence claim against the city of Port Orchard following a fall caused by a defect in the road. 194 Wn. App. at 763. Division 2 of the Court of Appeals noted that despite there being no evidence of actual notice, a "fact finder could infer that the City had constructive knowledge of defects

on one of its major roads that obviously have existed for years or decades." *Id*. at 774. The court concluded that evidence that the defect had "existed for a long period of time," alone was sufficient to create "genuine issues of material fact as to whether the City had constructive notice of the defective roadway conditions." *Id*.

ii. What Constitutes Reasonable Care Is an Issue of Fact.

As stated above, "[c]onstructive notice arises where the defective condition has existed for such time that a municipality in exercising ordinary care would have discovered the defective roadway condition." *O'Neill*, 194 Wn. App. at 773-774. Accordingly, constructive notice is established with proof the County—in the six to twelve years the defect existed—*should have known* of the dangerous condition in time to prevent the injury. *Ingersoll v. DeBartolo, Inc*., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994). This issue requires an inquiry into what care the County *should have* exercised given the circumstances. What "constitute[s] constructive notice will vary with time, place, and circumstance." *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 748, 375 P.2d 487 (1962); *see, e.g., Mead v. Chelan County*, 112 Wn. 97, 191 P. 825 (1920) (injury occurred on a "remote mountain road, serving but a few families."). "What would be reasonable or ordinary care under one set of facts might not be reasonable or ordinary care under another set of facts…As the danger becomes greater, the actor is required to exercise caution commensurate with it." *Ulve v. City of Raymond*, 51 Wn.2d 241, 246-247, 317 P.2d 908 (1957).

Here, the County did nothing to "exercise caution commensurate" with the danger. Certainly, the County knew trees were falling at alarming rates in a highly populated area because the County itself cleared the debris. Instead of sending its arborist to evaluate whether a systemic issue existed in the area—something Petitioners' expert testified was a basic tree safety practice—the County continued to rely solely on calls from untrained citizens. Even then, the County would not send its only trained arborist to evaluate the tree unless a second untrained individual determined it was necessary. Given the evidence Petitioners have presented surrounding the circumstances leading up to Clark's death, genuine issues of material fact exist as to whether the County exercised ordinary care.

Despite this substantial evidence, the trial court concluded, and the Court of Appeals affirmed, that as a matter of law the County was not on constructive notice of the dangerous condition caused by the subject tree. In doing so, the trial court and Court of Appeals erroneously analogized this matter to *Albin*.[35] In *Albin*, a tree fell in a "heavily-wooded, mountainous area" across a road that was closed by snow in the winter, and only used during the deer and elk hunting season. 60 Wn.2d at 747. This Court held as a matter of law that "reasonable care" did not require Columbia County to proactively test the "thousands of trees which line our mountain roads," and that the matter need not be submitted to a jury because there were "no circumstances from which constructive notice might be inferred." *Id*. at 748.

[35] The trial court analogized *Albin* in its oral ruling at the Summary Judgment hearing.

The factual circumstances of *Albin* could not be more different than the case at bar.

First, unlike the location in *Albin*, the subject tree was within feet of an intersection in a large developed residential neighborhood, 10 feet from a Bus Stop, and directly across the street from a playground. This road was not in a "heavily-wooded, mountainous area" that was only used "during the deer and elk hunting season." Second, unlike the white fir tree in *Albin*, the subject tree was a black cottonwood (a/k/a "weed tree") which the County knew was more susceptible to rot, disease, branch failure, and crown failure. Third, the subject tree displayed visible signs of defects in the way it leaned over the road, had ivy growing up its trunk, and had fungal conks visible from the County right-of-way. Fourth, the County was aware of at least *six* trees falling in the vicinity of the subject incident, within 13 months' time. One of those trees was a black cottonwood located 30-40 feet from the subject tree that fell at the same intersection where the subject incident occurred. Two of those trees fell at the exact same intersection near an arterial road in the vicinity within four months of each other. And three of those trees were large cottonwoods that fell near a major arterial within a few blocks of the subject tree *just five days before the subject incident*.

Indeed, prior to its decision in this matter, Division 1 of the Court of Appeals distinguished *Albin* from cases, like the one at bar, where plaintiffs presented *any* evidence of constructive notice. In the unpublished Division 1 case of *Conine v. County of Snohomish*, 138 Wn. App. 1039, 2007 WL 1398846 (Wash. Ct. App. Div. 1, May 14, 2007), the plaintiffs were struck

by a roadside tree while traveling through a developed residential area of Lynnwood, Washington. The plaintiffs filed suit against the County as owners of the land where the tree was located, and against the State for negligent maintenance of the roadway. The trial court dismissed both defendants on summary judgment, contending that neither had a duty to inspect. *Id*. at *1.[36] On appeal, the State relied on *Albin*. The Court of Appeals rejected that comparison and reversed the trial court's summary dismissal, concluding: "Unlike *Albin*, this was not a remote, rural mountain road which in hunting season was well traveled. The differences between these facts and the *Albin* case preclude a finding that the State lacked constructive notice as a matter of law. Constructive notice of a dangerous tree gives rise to a duty to inspect. Summary judgment was improperly granted on the basis of no duty to inspect." *Id*. at *4.

The Court of Appeals' decision here is inconsistent with its decision in *Conine*. In fact, since *Conine*, Division 1 of the Court of Appeals has consistently held that actual and constructive notice are issues of fact for the jury and that such issues should not be decided as a matter of law, like in *Albin*, unless the non-moving party presents no evidence from which constructive notice can be inferred. In the unpublished case of *Almo v. City of Seattle*, 174 Wn. App. 1015, 2013 WL 1164408 (Wash. Ct. App. Div. 1, March 18, 2013), the Court of Appeals reversed the trial court's summary

[36] Petitioners acknowledge that the *Conine* decision is unpublished and do not cite to the matter as precedential. Rather, Petitioners cite to *Conine* to highlight the inconsistencies in the way in which the Court of Appeals has approached these cases and the need for this Court to clarify the scope of the County's duty to its residents.

dismissal of plaintiff Almo's negligence claim against the City of Seattle. Almo sued the City after tripping and falling on an offset in a Seattle public sidewalk. *Id*. at *1. The record established that the City did not routinely inspect sidewalks but, instead, relied on citizens to report unsafe conditions. *Id*. In evaluating whether this practice was reasonable as a matter of law, the Court of Appeals considered the location of the offset, which was on a busy road near a synagogue and a mailbox, the height of the offset (which was substantial at one inch) and the amount of time the offset had existed (which was in dispute). *Id*. at *2. The Court of Appeals concluded that Almo presented sufficient evidence to show there was a genuine issue of material fact whether the City should be charged with constructive notice. *Id*. at *3. The Court of Appeals also rejected the City's contention that Almo had to present evidence that the City's sidewalk maintenance regime was unreasonable or that there was a better way to effectuate repairs. *Id*. at *4.

Here, on summary judgment, the County took a similar position as the City did in *Almo*. However, in *Almo*, the Court of Appeals considered and rejected the notion that a plaintiff must provide evidence of what the City ***should*** have done. *Almo*, 174 Wn. App. at*4. Here, the Court should reach the same conclusion. Given the substantial evidence presented by Petitioners regarding the circumstances leading up to Deidra Clark's death, it is a question of fact for the jury to decide as to whether the County was on actual or constructive notice of the of the dangerous condition and whether the County's "response" to the totality of circumstances leading up to the death of Ms. Clark was reasonable.

iii. Whether the County Would Have Discovered the Dangerous Condition Is an Issue of Fact.

Finally, on summary judgment, the County claimed that it was not on constructive notice because even had it done something to inspect potentially dangerous tree conditions in the area, the subject tree would not have "drawn special scrutiny" and, thus, would not have been discovered. First, whether the County, in its exercise of reasonable care, would have discovered the subject tree is an issue of fact for the jury. Second, the County's self-serving and conclusory statement ignores the undisputed *visible* defects its own expert identified while inspecting the tree.

c. Whether the Dangerous Condition Was Foreseeable Is an Issue of Fact.

The issue of foreseeability must also be submitted to the jury. Washington law is clear. No proof of notice is necessary if the dangerous condition that caused injury "was one [the government] should have foreseen and guarded against." *Nguyen v. City of Seattle*, 179 Wn. App. 155, 166, 317 P.3d 518 (2014) (citing *Albin*). If a plaintiff raises factual questions as to whether the dangerous condition was foreseeable, "[a] jury must decide whether such risk was foreseeable, and whether Defendants fulfilled their duties in light of the foreseeability of the risk." *Iwai v. State, Emp' Sec. Dept.*, 129 Wn.2d 84, 101-102, 915 P.2d 1089 (1996). Notably, to establish foreseeability, Petitioners need not establish the County should have anticipated *the specific cottonwood* was going to fall. *Id*. at 101. Accordingly, the issue here is whether the County's knowledge of several

warning signs—discussed in detail above—made it foreseeable that other cottonwoods in the vicinity tended to endanger the public. Because the issue of foreseeability presents a genuine issue of fact, the jury must be permitted to evaluate all the warning signs present in this case to determine whether the County should have foreseen the dangerous condition.

B. The Trial Court and Court of Appeals Erred In Striking Unspecified Portions of Petitioners' Expert's Report.

The trial court and Court of Appeals erred in striking unspecified portions of Galen Wright's testimony as "speculative." To the contrary, Wright came to the supported conclusion that the subject tree would have likely drawn special scrutiny had the County actually engaged in an inspection. Indeed, this type of "speculation" is permitted. For example, in *Herskovits v. Grp. Health Co-op. of Puget Sound*, 99 Wn.2d 609, 625–26, 664 P.2d 474, 482 (1983), this Court discussed the Michigan case of *Harvey v. Silber,* 300 Mich. 510, 2 N.W.2d 483 (1942) and said this: "Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass." *Herskovits*, 99 Wn.2d at 625-626. Accordingly, Wright was not required to establish with *certainty* what would have happened had the County complied with the standard of care and conducted an inspection following the multiple tree falls in the area. All Wright was required to establish, as he did, was that given the visible defects in the subject tree, it is likely that the hazardous nature of the tree would have been discovered during a reasonable inspection by the County.

RESPECTFULLY SUBMITTED this 9th day of September, 2021.

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DATED this 9th day of September, 2021.

Danna Hutchings
Legal Assistant

APPENDIX

A. Unpublished Opinion, *Deirtra Williams, et al. v. King County, et al.*;
Court of Appeals of the State of Washington, Division I,
Case No. 81075-8-I, dated August 2, 2021

Appendix A

FILED
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Court of Appeals
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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEIRTRA WILLIAMS,
as personal representative of the
ESTATE OF DEIDRA L. CLARK;
A.M.C., a minor child;
DEIRTRA CLARK, a single person;
NORMAN DEVOE, a single person;
R.E.A., a minor child,

Appellants,

v.

KING COUNTY,
a municipal corporation;
CANDLEWOOD RIDGE
HOMEOWNER'S ASSOCIATION
(d/b/a CANDLEWOOD
RIDGE/CARRIAGE WOOD
HOMEOWNER'S ASSOCIATION),
a Washington nonprofit corporation;
CANBER CORPORATION,
a Washington corporation,
ISSAQUAH TREE CARE LLC, a
Washington corporation,

Respondents.

No. 81075-8-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — Appellants sued King County for various forms of negligence after a tree fell across a road onto a passing car killing the driver and injuring a passenger. Appellants challenge the trial court striking a portion of their expert's report, striking a Google image of the tree, and granting of summary judgment to the County. Finding no error, we affirm.

FACTS

On November 13, 2017, Deidra Clark was driving along SE 179th Street near the Candlewood Ridge development in unincorporated King County, Washington (County). Deidra's twin sister, Deirtra Clark, was in the front passenger seat; Deidra's daughter, four-year-old A.M.C., was in the back seat.[1] According to the County, the National Weather Service had a high wind warning in effect for that date, and the area was likely experiencing gale force winds with gusts of up to 35 to 45 miles per hour.

As the car neared the intersection of SE 179th Street and 159th Avenue SE, a black cottonwood tree (subject tree) fell on the car. Deidra was killed and Deirtra was injured. A.M.C. was not injured. Norman DeVoe was Deidra's fiancé and A.M.C.'s father. He arrived at the scene of the accident within minutes, saw his deceased fiancée, and looked for his daughter before realizing that she had already been removed from the car.

Deirtra Williams (mother of Deidra and Deirtra Clark) as personal representative of Deidra's estate, A.M.C., Deirtra Clark, and Norman DeVoe sued King County, the Candlewood Ridge Homeowner's Association (HOA), and Canber Corporation (the HOA's landscaping contractor). For clarity, we refer to the plaintiffs collectively as Williams. The complaint raised three causes of action: negligence; negligent hiring, training, retention and/or supervision; and negligent infliction of emotional distress. Williams subsequently amended their

[1] We use first names for clarity when family members share the same last name.

complaint several times, including adding defendant Issaquah Tree Care (contracted by the HOA to inspect and maintain trees on HOA property).[2] As litigation unfolded, the following facts and opinions were made part of the record.

The black cottonwood tree that fell was located on private property owned by the Candlewood Ridge Homeowner's Association. After the accident, King County Road Services Division vegetation specialist James Kotarski inspected the remaining stem, or trunk, of the subject tree from the County right-of-way. He said the stem was partially covered in English ivy and he saw a fungal "conk", or fruiting body, on the southwest side of the stem. Such conks usually indicate decay that structurally weaken the trunk of a tree.

An expert arborist for Williams, Galen Wright, inspected the remaining stem of the tree from the HOA's private property. He noted the English ivy partially covering the stem, three conks of stem decay fungi, some decay in one "lateral anchor root," and some bark separation just above the "root collar." According to Wright, the black cottonwood tree species is prone to branch, stem, and root failures even in non-storm conditions. Both Kotarski and Wright agreed that the subject tree leaned over the road.

The County Road Services Division maintains a "Road Helpline" that allow citizens, County employees, and partner agencies to call and report concerns about county roadways, including "trees of concern," defined as standing trees on or near a county roadway that may pose a hazard. Prior to the accident, the

[2] According to the record before us, all defendants besides the County have now settled with Williams; in any event, the County is the only defendant involved with this appeal.

County did not receive any reports about the subject tree.

In the 13 months prior to the accident, the County was aware of other trees that fell in the general vicinity. On January 20, 2017, another cottonwood tree on the same parcel of private property fell, which was located approximately 30-40 feet from the subject tree. In October 2016 and February 2017, two trees located about 0.6 miles away from the subject tree fell onto SE Petrovitsky Road. On November 8, 2017, two or three cottonwood trees[3] fell onto the County right-of-way at the intersection of SE Petrovitsky Road and 151st Avenue SE.

Defendant Candlewood Ridge Homeowner's Association moved to dismiss the claims of negligent infliction of emotional distress brought by DeVoe and A.M.C pursuant to CR 12(b)(6). The County joined the motion. The superior court dismissed DeVoe's claims for negligent infliction of emotional distress but not A.M.C.'s claims for the same.

The County moved for summary judgment. The County argued that its duty to maintain roads that are reasonably safe for ordinary travel did not extend to hidden dangerous conditions, which it did not create or have notice of, including decay in a tree located on private property. The County further argued that it did not have a legal duty to inspect all trees located near county roads in the absence of a complaint or other notice of concern about a particular tree. Last, the County argued that it enjoyed discretionary immunity.

Williams filed a written opposition to the County's motion for summary

[3] The record contains conflicting claims as to whether there were two or three trees that fell on this date. Either way, our analysis remains the same.

judgment and submitted a written report from Wright, a certified arborist and forester, and portions of his deposition testimony.

The County moved to strike (1) portions of Wright's opinions on the basis that they are speculative; and (2) a Google image of subject tree submitted by Williams in their opposition brief.

King County Superior Court held a hearing on the County's motion for summary judgment. At the conclusion of the hearing, the court granted summary judgment to the County ruling that the County did not have actual or constructive notice. The court struck the portions of Wright's opinion and the Google image that the County had objected to.

Williams appeals the order granting King County's motion for summary judgment and the earlier superior court order dismissing DeVoe's claims of negligent infliction of emotional distress.

DISCUSSION

Legal Standards

Municipalities are generally held to the same negligence standards as private parties. Helmbreck v. McPhee, 15 Wn. App. 2d 41, 50, 476 P.3d 589 (2020). Thus, to bring a negligence claim against King County, Williams must be able to prove duty, breach, causation, and injury. Id. The existence and scope of a duty are questions of law. Wuthrich v. King County, 185 Wn.2d 19, 25, 366 P.2d 926 (2016).

We review summary judgments de novo. Strauss v. Premera Blue Cross, 194 Wn.2d 296, 300, 449 P.3d 640 (2019). "Summary judgment is appropriate

when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' " Id. (alteration in original) (quoting Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008)); CR 56(c). We must construe all facts and inferences in favor of the nonmoving party. Scrivener v. Clark College, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). "A genuine issue of material fact exists when reasonable minds could differ on the facts controlling the outcome of the litigation." Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Motion to Strike

Appellants argue that the trial court erred by striking a portion of Wright's expert report and a photograph that they included in their brief to the trial court in opposition to summary judgment, which they described as a Google image of the subject tree taken six years before the accident.

We review these trial court evidentiary decisions de novo. See Momah v. Bharti, 144 Wn. App. 731, 182 P.3d 455 (2008) (on appeal from summary judgment, trial court rulings on the admissibility of evidence are reviewed de novo even though the same rulings might be reviewed only for abuse of discretion in an appeal following a trial).

A. Wright's report

As a preliminary matter, appellants contend that the superior court did not specify which of Wright's opinions should be stricken and that if the case proceeded to trial, it would be unclear which "portions" of Wright's opinions were

stricken. Appellants contend that this lack of clarity alone justifies reversal of the superior court's decision to strike. Id.

The superior court's ruling was not so vague as to merit reversal on that basis. The County's motion to strike identified the following portion of Wright's opinion that the County argued was too speculative: "This recent, nearby tree failure should have stimulated a review of other trees in the vicinity on the HOA property as well as by King County. If this had been done, likely the fungal conks would have been noticed triggering a more detailed assessment of the subject tree." In its oral ruling, the superior court said it was striking Wright's "opinion as to the speculative portions of his opinions. He indicated that if there had been an inspection, it is likely that the conks would have been noticed. That is all speculative and I will strike his testimony as well." The court's written order stated that the County's motion to strike was granted. The record is sufficiently clear that the superior court struck the portion of Wright's opinion that the County identified as too speculative and any deposition testimony that stated the same.

Next, appellants argue that Wright's opinion was not impermissibly speculative. An expert's opinion must be based on fact and cannot simply be a conclusion or based on an assumption if it is to survive summary judgment. Strauss v. Premera Blue Cross, 194 Wn.2d 296, 301, 449 P.3d 640 (2019).

Wright was unable to cite any treatise or other authority stating that a tree falling in one area requires an examination of other trees in the area, nor did he opine on how far from any fallen tree such an inspection should cover. Wright did not know why the other trees in the general vicinity fell or whether they were

diseased. Wright viewed only the remaining stump of the tree that failed in January 2017; he did not examine the other fallen trees that are at issue here. Concluding that had the County examined these other trees, they would likely have noticed fungal conks was nothing more than speculation. The trial court did not err by striking the disputed portion of Wright's report and any corresponding testimony.

B. The disputed Google image

Appellants argue that the trial court erred by striking the disputed Google image of the subject tree because their expert, Wright, based his opinion on it. Thus, they argue, the image was admissible under ER 703[4] as facts or data upon which Wright based his opinion.

However, the record is not clear that Wright actually based his opinion on the disputed Google image. Wright's report contains an image from Bing Maps Streetview, and in his deposition testimony he refers to the "Bing imagery," "imagery from Bing 2011," and "the photos we have, the imagery we have from Bing 2011…". The logical conclusion is that Wright was referring to the Bing image in his report, not the Google image. But because the Bing image was from 2014 and the Google image was from 2011, it is not altogether clear from his deposition testimony which image Wright relied upon. Appellants have not demonstrated conclusively that Wright relied on the disputed Google image to

[4] ER 703 states, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

form his expert opinion.

Even if Wright relied on the Google image to form his opinions, as the appellants claim, that does not make the image substantively admissible evidence under ER 703. We rejected a similar argument last year in the case of Desranleau v. Hyland's, Inc., 10 Wn. App. 2d 837, 844–45, 450 P.3d 1203, (2019), review denied, 195 Wn. 2d 1004, 458 P.3d 783 (2020):

> Desranleau also incorrectly argues that because Dr. Pietruszka relied on Reid's statements when forming his opinion, those statements became admissible evidence under ER 703. ER 703 allows an expert witness to base their opinion on facts or data regardless of their admissibility, and ER 705 provides that an expert may be required to disclose the underlying facts or data on which their opinion is based, but neither provides that inadmissible statements become substantively admissible simply because an expert relied on them in forming their conclusions. See State v. Anderson, 44 Wn. App. 644, 652, 723 P.2d 464 (1986) (ER 705 is not "a mechanism for admitting otherwise inadmissible evidence as an explanation of the expert's opinion.").

Appellants further argue that the jury should decide the weight or credibility given to the image. But that ignores the requirement of authentication. Under ER 901, authentication is a "condition precedent to admissibility." To lay a proper foundation for photographs, "it is only required that some witness, not necessarily the photographer, be able to give some indication as to when, where, and under what circumstances the photograph was taken, and that the photograph accurately portrays the subject illustrated." State v. Newman, 4 Wn. App. 588, 593, 484 P.2d 473 (1971). Authentication would certainly be important in this case where the image appeared on its face to be distorted because even the light pole appeared to be leaning. Appellants failed to authenticate the

image. The trial court did not err by striking the disputed Google image offered by the appellants.

County's Duty: Notice and Foreseeability

Appellants argue that issues of material fact exist as to whether the County had actual or constructive notice of the "unsafe condition" — which they define as either the general fact that black cottonwoods lined the street or the specific danger that the subject tree would fall — or that such condition was foreseeable. For any one of these reasons, appellants argue, the County had a duty to take action to mitigate the danger.

Whether a duty exists is a question of law we review de novo. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

A. Actual or Constructive Notice

Government entities owe a duty to all persons to maintain their roadways in a condition that is reasonably safe for ordinary travel. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). But this duty is conditional, for it arises only when the government entity has notice of and time to correct the hazard in question. Helmbreck v. McPhee, 15 Wn. App. 2d 41, 50, 476 P.3d 589 (2020). As a result, the County must have (1) notice of a dangerous condition which it did not create, and (2) reasonable opportunity to correct it before liability arises for negligence. See id. Notice to King County may be actual or constructive. Id. Constructive notice may be inferred from the elapse of time a dangerous condition is permitted to continue. See id. "Constructive notice arises if the condition existed for a period of time so that the municipality should have

discovered its existence through the exercise of reasonable care." Ogier v. City of Bellevue, 12 Wn.App.2d 550, 555, 459 P.3d 368 (2020).

Three cases relating to the dangers of roadside vegetation are instructive: Albin v. National Bank of Commerce of Seattle, 60 Wn.2d 745, 375 P.2d 487 (1962), Wuthrich v. King County, 185 Wn.2d 19, 366 P.2d 926 (2016), and Helmbreck v. McPhee, 15 Wn. App. 2d 41, 476 P.3d 589 (2020).

In Albin, a tree fell and struck a car driving on a county road through a "heavily-wooded, mountainous area, during a windstorm of disputed force." 60 Wn.2d at 747. The road was used "somewhat extensively" during the deer and elk hunting season, though it was "remote and closed by snow during the winter." Id. A person in the car was killed and the administrator of his estate sued the county, among other parties. Id. The trial court dismissed the county from the lawsuit. Id. The Washington Supreme Court held the trial court did not err by dismissing the county because there was no evidence the county had actual or constructive notice that the tree posed a danger:

> There is no evidence that the county had actual notice that the tree which fell was any more dangerous than any one of the thousands of trees which line our mountain roads, and no circumstances from which constructive notice might be inferred. It can, of course, be foreseen that trees will fall across tree-lined roads; but short of cutting a swath through wooded areas, having a width on each side of the traveled portion of the road equivalent to the height of the tallest trees adjacent to the highway, we know of no way of safeguarding against the foreseeable danger…

Id. at 748-49.

In Wuthrich, a motorcyclist sued King County after he was hit by a car alleging that King County was liable for his injuries because overgrown

blackberry bushes obstructed the car driver's view of traffic at the intersection. 185 Wn.2d at 24-25. The trial court dismissed the action against the county on summary judgment. Id. The Washington Supreme Court disagreed, holding that there were genuine issues of material fact as to whether the county breached its duty. Id. The Washington Supreme Court explained the county's duty as follows: "We reaffirm that a municipality has a duty to take reasonable steps to remove or correct for hazardous conditions that make a roadway unsafe for ordinary travel and now explicitly hold this includes hazardous conditions created by roadside vegetation." Id. at 27.

Regarding breach of duty, the Washington Supreme Court stated, "Whether the County breached its duty depends on the answers to factual questions: Was the road reasonably safe for ordinary travel, and did the municipality fulfill its duty by making reasonable efforts to correct any hazardous conditions?" Id. at 27. The Washington Supreme Court stated that the plaintiff introduced sufficient evidence to create genuine issues of material facts as to both of these questions: The driver testified that her view of the intersection was obstructed by the blackberry bushes, and the plaintiffs' experts testified that the County could have taken a variety of corrective actions to address the issue. Id. at 27.

In Helmbreck, the plaintiff sued the city of Des Moines, among others, for negligence based on injuries he sustained in a car accident. 15 Wn. App. 2d at 46. The plaintiff claimed he could not see down the street due to a hedge blocking his view of the street and got into an accident due to the alleged lack of

visibility. Id. The hedge was located on private property. Id. at 46. The plaintiffs argued that the city of Des Moines had constructive notice that the vegetation made the intersection dangerous because the vegetation had existed for at least seven years. Id. at 54. Plaintiffs' expert testified that the hedge had been cut back about four or seven years before the accident, and at that time,, the intersection probably would have looked safe to City employees and most drivers; but, he opined, on the day of the accident the "overgrown vegetation" obstructed drivers' view of traffic conditions and created a dangerous condition. Id. at 54.

Despite the alleged length of time that the vegetation had existed and the testimony of the plaintiff's expert, Helmbreck held that the record lacked evidence that the City had constructive notice. Id. at 54. "As the trial court correctly noted, Helmbreck has provided no authority that the City had a legal duty to inspect the street and inform itself of dangerous conditions. No legal basis has been established for a presumption that the City should have known the vegetation was a dangerous condition." Id. at 54. Helmbreck distinguished Wuthrich because in Wuthrich there was evidence that the blackberry bushes at issue had been there for years and King County knew about them. Id. at 53.

Unlike the County's knowledge of the existence of the blackberry bushes that obstructed drivers' views in Wuthrich, in the instant case, there is no evidence that the County had actual notice of the dangers of the subject tree. The evidence the appellants point to in support of their argument that the County had actual notice — including previous tree falls in the vicinity of the subject tree

and the claim that black cottonwoods are generally susceptible to rot and failure — are not specific to the subject tree but instead relevant to the issues of constructive notice or foreseeability.

Turning to constructive notice, the appellants argue that an issue of material fact exists whether King County had constructive notice of the subject tree because (1) Wright stated that there were three conks of a stem decay fungi ("fungal conk") on the tree that would have been present on the tree between six and 12 years; (2) Wright opined that the crown of the tree and a portion of the stem of the tree were leaning over the road at least 15 to 20 degrees; (3) the tree was located in a "highly trafficked" residential neighborhood; (4) other trees had fallen in the vicinity of where the subject tree fell.

The appellants' constructive notice claims are most analogous to Helmbreck and Albin, where there was a lack of evidence that the local government entity had constructive notice and were dismissed from the lawsuits. Because we view the facts in the light most favorable to the appellants, we assume the subject tree, which still had leaves when it fell, leaned slightly toward the road; the subject tree was partially covered in ivy and had at least one fungal conk visible from the County right-of-way after viewing the stem intensely for a few minutes; and that other trees, some of which were black cottonwoods and some not, fell in the general vicinity of the subject tree.

Despite the fact that some of these conditions had allegedly existed for a number of years, as in Helmbreck, the conditions simply were not so obvious or dangerous as to put the County on constructive notice that the subject tree itself

posed a danger. Appellants have not provided any evidence regarding why the other fallen trees in the vicinity fell or connecting their falls to the fall of the subject tree. Appellants have not demonstrated that the lean of the subject tree was uncommon or particularly dangerous. Kotarski, the County's vegetation specialist for the Road Services Division, stated in his declaration that it is "not uncommon for trees along roadways to lean toward the road, because trees seek sunlight and there is less competition for that over the roadway . . . Leaning trees are common along King County roadways and the fact that a tree leans toward the road does not make it a hazardous tree . . . " Kotarski visually observed the "snag" (stem) of the tree after the accident and wrote, "I could tell that the snag was leaning slightly north, toward the county road. The amount of lean I observed was similar to many tress located near roadways in King County and it was not leaning at a severe angle."

In short, the appellants' evidence is not sufficient to create a genuine issue of material fact regarding whether the County was on actual or constructive notice of the alleged dangerous condition of the subject tree.

B. Foreseeability

Appellants argue that a genuine issue of material fact exists as to whether the County should have foreseen that the subject tree posted a danger to the public. No notice (either actual or constructive) is required if the danger was one the County should have foreseen and guarded against. Albin, 60 Wn.2d at 748. The question of foreseeability goes to the question of whether the defendant owed a duty of care to the plaintiff. Rikstad v. Holmberg, 76 Wn.2d 265, 268,

456 P.2d 355 (1969).

The appellants' argument regarding foreseeability is similar to their argument regarding constructive notice — that is, they rely on the same "warning signs," as they characterize them, to argue that they created a genuine issue of material fact regarding foreseeability. Appellants contend that because of these "warning signs," the County should have been proactive and closely examined any leaning black cottonwoods in the vicinity when it was aware that several black cottonwoods had fallen in the general vicinity. However, this suggests the County should forage for signs of dangerous conditions along County roads, which is not what the law requires. We rejected this argument in Helmbreck: "As the trial court correctly noted, Helmbreck has provided no authority that the City had a legal duty to inspect the street and inform itself of dangerous conditions. No legal basis has been established for a presumption that the City should have known the vegetation was a dangerous condition." Helmbreck, 15 Wn.App.2d at 54.

For the same reasons appellants did not create an issue of material fact regarding constructive notice, detailed in the section above, they also did not create a genuine issue of material fact regarding foreseeability. They did not demonstrate that the County should have reasonably anticipated the danger based on the small number of other trees that had fallen at different times in the general vicinity, even if some of those trees were the weak-wooded black

cottonwood species.

The trial court did not err by granting the County's motion for summary judgment.[5]

Affirmed.

Coleman, J.

WE CONCUR:

Brunson, J.

Smith, J.

[5] Because we hold that the County had no duty, we need not address the appellants' argument that the trial court erred by dismissing DeVoe's claims of negligent infliction of emotional distress nor the County's argument that it was entitled to discretionary immunity.

CORR DOWNS

September 09, 2021 - 3:32 PM

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