66233-3 66233-3

No. 66233-3-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JOHN BOILEAU, Respondent,

v.

SANG RYONG YOO (aka Sam Yoo), Appellant, CITY OF SEATTLE, Respondent, ANNA MARIE SECRETO, MARK R. GREGG and JANE DOE GREGG, AMANDA MCGARTY and JOHN DOE MCGARTY, Defendants,

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REPLY BRIEF OF APPELLANT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 28 AM 10: 25

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A. Introduction

Respondents argue that the evidence of 2002 car/pedestrian accident was too remote in time to prove that foliage was blocking Mr. Yoo's view of the stop sign in this case. Respondents further argue that given the transitory condition of the tree at issue, its condition 2002, once remedied, could not prove the condition of the tree at the time of this accident on June 14, 2006. Finally, respondents further claim that the evidence offered by Mr. Finseth about the 2005 accidents failed to prove that the cause of those accidents were the same as the cause of the accident in this case. The evidence was offered, however, not to prove the cause of the accident in question, but rather to prove that defendants McGarty and the City of Seattle were on constructive notice of a dangerous condition. Without this circumstantial evidence, Mr. Boileau and Mr. Yoo could only offer the direct testimony of Mr. Yoo to prove the element of constructive notice. Washington courts support the admission of prior accidents and/or conditions involving similar circumstances and therefore it was error to exclude it.

B. Argument

1. Previous Accidents Not Too Remote in Time to be Admissible

There is no requirement that evidence of prior accidents be close in time to the accident at issue to be admissible on the issue of constructive notice. Constructive notice arises where the condition "has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." *Ingersoll v. DeBartolo, Inc.* 123, Wn.2d 649, 652, 869 P.2d 1014 (1994) (quoting *Smith v. Manning's, Inc.,* 13 Wn.2d 573, 580, 126 P.2d 44 (1942)). Here, the fact that accidents began happening again in 2005 suggests the previously trimmed tree in 2002 had grown back and obscured the stop sign up until the accident in this case on June 14, 2006. If anything, the remoteness of the previous events better support the issue of the existence of a dangerous condition since trees grow somewhat slowing over time in contrast to other transient conditions, such as snow and ice, which tend to dissipate relatively quickly. The evidence was relevant, probative and should have been admitted.

2. Transitory Nature of the Condition is Not the Issue

Similarly, the transitory nature of the tree is precisely why the City and Ms. McGarty were on constructive notice of a dangerous condition. Merely pruning a tree does not permanently resolve a previous dangerous condition. Respondents have cited no case that has excluded evidence

involving a transitory condition. Moreover, the issue is not the transitory nature of the tree, but rather whether the subject tree blocked Mr. Yoo's view of the stop sign and existed for long enough that the City and Ms. McGarty should have discovered it. Relevant to that issue is the fact that the same tree had grown to the point of obstructing the stop sign in 2002, was trimmed, and grew back to point in 2005 that Mr. Finseth noticed it was getting bigger and bigger, and that frequent accidents were beginning to happen at the intersection.

3. Similar Circumstances Not Similar Cause is the Prerequisite for Admission

With respect to the issue of similar circumstances, the trial court stated as follows:

> Mr. Finseth reports that he saw an accident in that intersection all involving cars traveling southbound on Fremont colliding with cars traveling on North 80th once a month, June, July, August, September 2005, 2006, and 2007...There's absolutely no evidence in Mr. Finseth's offer of proof that the vision of those drivers was obstructed and that that was the cause of the accident in 2005, 2006, or 2007.

RP, Excerpt of Proceedings, Offer of Proof Re Testimony of Andrew Finseth, September 20, 2011, p. 8.

The established case law requires only that circumstances surrounding the accidents are similar, not that causes of the accidents are the same. *Evans v. Miller,* 8 Wn.App. 364, 366-67,

507 P.2d 887 (1973); *Toftoy v. Ocean Shores Properties, Inc.*, 71 Wn.2d 833, 431 P.2d 212 (1967). The similarity of the circumstances cannot be denied here. Every accident involved a southbound driver on Freemont. Every accident happened during the high growing season of the year. Every accident involved a motorist who failed to stop at the stop sign on Freemont. The previous circumstance are shocking similar and it was error to exclude them.

4. The Only Proof of Obstruction Was Yoo's Self Serving Testimony.

Contrary to respondents' assertions, the only proof the tree obstructed Mr. Yoo's view of the stop sign was his arguably self serving testimony. Respondent McGarty denied ever having any concern about the tree even though the City has issued her a corrective notice. RP, Testimony of Amanda McGarty, p. 5-6, September 29, 2010. Officer Pio testified that she never looked from Mr. Yoo's view to see if the stop sign was obstructed. RP, Excerpt of Proceedings, Testimony of Officer Karen Pio, p.12-13, September 27, 2010. The trial court's ruling prevented Mr. Yoo from impeaching respondent McGarty with evidence of the City's 2002 correction notice or offering any other circumstantial evidence

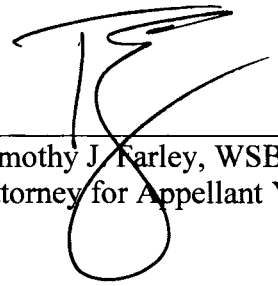
corroborating his testimony about the tree. Instead, Mr. Yoo was left with his own testimony to prove constructive notice of a dangerous condition.

C. Conclusion

Mr.Yoo respectfully requests that the court reverse the trial court's judgments entered in favor of the City against Mr. Boileau, and in favor of Mr. Boileau against Mr. Yoo, and remand the case back to the trial court for a new trial on the issue of liability as to Mr. Boileau's claims against Mr. Yoo, the City, and Ms. McGarty.

DATED this 18th day of July 2011.

FARLEY & DIMMOCK LLC



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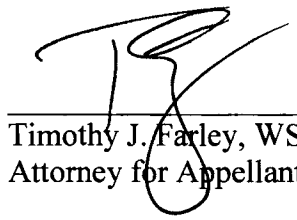
CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I mailed a copy of the foregoing Reply Brief of Appellant to the parties listed below, postage prepaid, on May 6, 2011.

DATED this 2nd day of July, 2011, at Everett, Washington.

FARLEY & DIMMOCK, LLC



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