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2011


NO. 66336-4-1

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

KAREN HATCH, a married woman,

Appellant

v.

KING COUNTY, a municipal corporation; and
SNOQUALMIE VALLEY SCHOOL DISTRICT #410,

Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Beth Andrus)

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

1. Plaintiffs have provided sufficient questions of fact as to whether the old, tipped over, moss covered concrete wall footer over which she tripped was open and obvious.

Both defendants have argued that the old, tipped over, moss covered broken concrete wall footer over which the plaintiff fell was as a matter of law an open and obvious condition citing Hofstatter v. Seattle, 105 Wash.App 596, 20 P.3d 1003 (2001) as controlling and instructive. Although the plaintiff will not again fully distinguish Hofstatter in this reply as it has been sufficiently distinguished in the opening brief, plaintiff would like to address the argument of the defendants in their briefing materials.

Initially, please note that the plaintiff has established through the testimony of the principal of Fall City Elementary, Dan Schlotfeldt, that the path taken by plaintiff Karen Hatch was indeed a routinely used pedestrian path by parents of the school in the identical manner used by Mrs. Hatch. Specifically, Principal Schlotfeldt testified that parents would typically park head in (and not parallel park as represented by the defendants), park in an area that was on school grounds, walk perpendicular across the old

sidewalk which is directly adjacent to where the subject broken tipped over wall footer was, and walk across the grass area "the majority of the time". (CP 181-182). A picture depicting this common pedestrian path is found at CP 189. There was no such evidence of common continuous pedestrian usage over the years in Hofstatter which had a factual record significantly different than the case at bar.

Both defendants also continue to argue the facts as they relate to the issue of distraction. In defendant SVSD's brief, they have cited Hofstatter for the proposition that it is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped planting strip than while walking on the sidewalk. However, as stated above, this was not a planting strip and the usage of this foreseeable pedestrian path in the case at bar is significantly more extensive than the factual record in Hofstatter. Moreover, the mere fact that the plaintiff had a duty to use reasonable care does not eliminate the defendants' duties in their own right to exercise reasonable care. See Plaintiff's original brief and the references to Restatement Second of Torts, Section 343A. At best for the defendants, the parties' respective duties under the specific facts of this case must be weighed by a jury, are questions of fact and will

be dealt with by the jury with instructions regarding the parties' comparative fault.

Lastly on this issue, both defendants disagree with the opinions of the plaintiff's human factors expert, Dr. Gary Sloan. Dr. Sloan has opined that the broken concrete wall footer was a tripping hazard, was in a foreseeable pedestrian path, was inconspicuous because it was covered in green moss, and fell outside Mrs. Hatch's direct visual field and also her peripheral visual field. He further opined that she would have no expectation of it being there, and that she was distracted by her children, a fact which was not only generally foreseeable but specifically acknowledged by Principal Dan Schlotfeldt.

The defendants' contention that Dr. Sloan's opinion or his testimony "does not help" is pure argument. ER 702 allows the introduction of scientific, technical or other specialized knowledge to assist the trier of fact in understanding evidence or to determine a fact in issue. Additionally, the trier of fact will be instructed that under WPI 2.10 they may consider an expert's testimony and acknowledge it or reject it, in part or in whole, as they see fit. Case law is clear that it is for the jury to determine what weight should be given expert

testimony. See Gerberg v. Crosby, 52 Wn.2d 792, 329 P.2d 184 (1958); Sigurdson v. City of Seattle, 48 Wn.2d 155, 292 P.2d 214 (1956); and Windsor v. Bourcier, 21 Wn.2d 313, 150 P.2d 717 (1944).

The defendants are free to argue to the trier of fact that a reasonable person should have kept her eyes riveted on the ground at all times when they are walking. Conversely, the plaintiff should also be allowed to argue that a reasonable person with a duty to maintain its premises and with actual or constructive knowledge of the existence of a decades old, tipped over, broken moss covered concrete wall footer, in a path routinely used by parents as pedestrians to pick up their kids, and who are admittedly distracted by their environment, , should be removed or pedestrians should be warned of its existence. In fact, that is just what the defendants acted in concert to do after the fact.

Notably, in contrast to Hofstatter, there are numerous cases reversing trial courts' granting of summary judgments in trip and fall cases similar to the one at bar. In Sjogren v. Properties of the Pacific Northwest, LLC, 118 Wn.App. 144, 75 P.3d 592 (2003) the trial court had granted the defendant's motion for summary judgment of dismissal. However, the Court of Appeals reversed, holding that a

genuine issue of material fact existed as to whether the possessor maintained its premises in an unsafe condition even if the invitee knew of “an open and obvious danger.” The Sjogren court held that a possessor can still be liable in such a situation when:

“[T]he possessor has reason to expect that the invitee’s attention may be distracted, or that he [or she] will not discover what is obvious, or will forget what he [or she] has discovered, or failed to protect...against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [person] in [that] position the advantages of doing so would outweigh the apparent risk.”

Sjogren, 118 Wn.App., at 149 (citing Restatement (Second) of Torts, section 343A).

Not surprisingly, issues regarding plaintiff Karen Hatch's expectancy, her distraction, the undisputed fact that she was unaware of the old, tipped over, moss covered broken concrete wall footer, whether she knew it was dangerous, and whether she looked down are all issues which are addressed by the plaintiff's expert in human factors, Gary Sloan, Ph.D., and are questions of fact. These issues are precisely the reason plaintiffs secured the testimony of Dr. Sloan to explain to a trier of fact why persons similarly situated as plaintiff Karen Hatch do not expect to encounter tripping hazards when they

walk and why people do not keep their eyes riveted to the ground. Keep in mind that the plaintiff in Hofstatter offered no such testimony supporting their contention that the bricks were a danger.

In addition to Sjogren, there are other numerous cases reversing trial court's granting of summary judgments in trip and fall cases similar to the one at bar. The plaintiffs would direct the court to the following cases; Jarr v. Seeco Const. Co., 35 Wn.App. 324, 329-330, 666 P.2d 392 (1983), (questions or foreseeability, obviousness of the danger, contributory negligence, and reasonableness of possessor's conduct, all questions of ultimate fact for the trier of fact); Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960); and Smith v. Mannings, Inc., 13 Wn.2d 573, 126 P.2d 44 (1942) (whether or not plaintiff was negligent in failing to see dangerous condition on a floor is a question of fact for the jury).

Arguing the defendants' logic to its conclusion would only lead to the result that in every case where somebody does not look down at their feet when they're not on an actual sidewalk, the case must be dismissed no matter what. Such a broad interpretation of Hofstatter would by necessity overrule decades of precedent and would improperly take these issues away from the consideration of the jury.

Simply put, this was not somebody who tripped on some buckled up red bricks in a small parking strip between the sidewalk and the street where there was no evidence of distraction, conspicuousness, or any expert testimony offered by the plaintiff regarding whether it was dangerous. The court's granting of summary judgment must be reserved and remanded for trial

2. The defendants' conduct in jointly removing the tripping hazard contradicts their argument that the tripping hazard was open and obvious and also raises a question of fact as to who was responsible for maintaining that area in a safe condition.

Both defendants give rather short shrift in their briefs to the plaintiff's contention that this case falls squarely within the exceptions to ER 407 which allow the introduction of subsequent remedial measures. The explicit language of ER 407 allows the introduction of such evidence for purposes of "proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." It would be difficult for a plaintiff to provide a court with a case more appropriate for the introduction of such evidence than the one at bar. First, note in the defendants' competing briefs that they argue over who was in control over the property such as to

impose the duty to maintain it. As referenced in the plaintiff's opening brief, Principal Dan Schlotfeldt said this incident occurred on school property and it is undisputed that it fell within the King County right of way easement granted to the county. Both parties joined in concert in having a lengthy meeting about the tripping hazard in question and both parties agreed to remove the tripping hazard, re-seed it and maintain it. This fact alone rebuts their finger pointing on control and clearly falls within the exceptions to the general rule against admissibility.

Additionally, both defendants have argued that the condition was open and obvious. Again, in addition to the argument supra that whether a tripping hazard is open and is obvious is question of fact for the jury, the plaintiff should be allowed to argue to the jury that the defendants' own conduct rebuts their contention that it was open and obvious. Why not leave it in the condition it was in for decades? Again, as stated in plaintiff's opening brief, this issue can easily be dealt with by a limiting instruction pursuant to ER 102 with the jury being instructed that it is not proof of negligence per se.

ER 407 clearly contemplates certain cases with certain facts where this type of evidence would be admissible or else the drafters

would have just said as a blanket bright line rule that subsequent remedial measures are not admissible for any purpose in any case. The fact that there are exceptions to the rule means that there must be cases where it is appropriate and this is such a case.

II. CONCLUSION

The plaintiff's have offered evidence through the deposition testimony of the plaintiff and respective agents of the defendants that plaintiff Karen Hatch parked head in, on the school grounds and in the county's right of way, in a manner many parents had done the majority of the time, and in an area where she had never been before. She then got out, was distracted by two five year olds getting out of her car as would be foreseeable generally and specifically admitted by Principal Dan Schlotfeldt, traveled over a foreseeable and commonly used pedestrian path, and tripped over an old, tipped over, moss covered broken concrete wall footer which served no useful purpose, blended in to neighboring grass and was different in color and shape from nearby wall footers. After this incident, the defendants met together, and while acting in concert came up with a plan to eliminate what they admitted was a tripping hazard, and then eliminated the tripping hazard, re-seeding it with grass, and then agreeing to

maintain the property. These facts are clearly distinguishable from the facts in Hofstatter. As a result, questions of fact exist regarding the parties' comparative fault which can only be resolved by a jury as is the plaintiff's constitutional right.

For the foregoing reasons, plaintiff Karen Hatch would respectfully request that this court reverse the trial court and remand this matter back for trial.

RESPECTFULLY SUBMITTED this 8th day of April, 2011.

LAW OFFICES OF JOHN J. POLITO, PLLC.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of this document to be served via legal messenger on:

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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

KAREN HATCH, a married woman,

No. 66336-4-1

Appellant,

King County Superior Court

vs.

No. 09-2-16511-4

DECLARATION OF MAILING

KING COUNTY, a municipal corporation;
SNOQUALMIE VALLEY SCHOOL
DISTRICT #410; and JOHN DOES 1 - 5,

Respondents.

The undersigned declares that I am now, and at all times herein mentioned was, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date, I caused to be served in the manner noted below a document entitled **Appellant's Reply Brief** on the following:

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I declare under the penalty of perjury under the laws of the State of Washington
that the foregoing is true and correct.

DATED this 8th day of April, 2011, at Bellevue, Washington.



Tracy Strash, Paralegal