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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUN 5 AM 11:36

No: 67723-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON, SEATTLE

LARRY ALMO and ILYSE ALMO, husband and wife, ESTHER ALMO,
a minor child, by and through her mother, ILYSE ALMO,

Plaintiff/Appellant

vs.

CITY OF SEATTLE.

Defendant/Respondent

corrected
REPLY BRIEF OF APPELLANTS

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Tel: (206) 322-5200

ORIGINAL

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1. Since Seattle admits it does not conduct inspections of its sidewalks for dangerous conditions, summary judgment should not have been granted.

The City of Seattle admits it does not inspect its sidewalks (CP 169), but claims it has no duty to do so. If a duty to inspect exists, then summary judgment should not have been granted.

Plaintiffs in their opening brief quoted WPI 140.02 and the commentary following as proof that a duty to inspect sidewalks does exist. The City of Seattle seeks to minimize the clear statement of duty to inspect quoted from the comments. Presumably the jury instructions and comments following are attempts to accurately state the laws as it relates to the subjects addressed. At minimum it can be stated the creators of the WPI believe a duty to inspect sidewalks exist.

The City of Seattle presumably will not disagree that it has a duty to use reasonable care to maintain its sidewalks safe for ordinary travel. In the context of landowner liability for hazardous conditions, the Washington Supreme Court noted the elements of the action that need to be established are duty, breach, injury and proximate cause. The Supreme Court stated a landowner's duty only attaches "if the landowner knows or by the exercise of reasonable care would discover the condition. . . " Iwai

v. State, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). The Washington Supreme Court then stated: “The phrase “reasonable care” imposes on the landowner the duty to inspect for dangerous conditions. . . “ Id.

The duty of the City of Seattle to inspect its sidewalks has been found by the courts since at least 1918. In Wren v. City of Seattle, 100 Wash. 67, 170 P. 342 (1918) a pedestrian was injured by a Seattle sidewalk. A verdict in favor of the pedestrian was achieved and the City of Seattle appealed. In particular the City of Seattle objected to the following jury instruction as constituting fatal error:

It is the duty of the city at all times to keep its sidewalks on its public streets in a reasonably safe condition for public use, and not to permit anything that will make the use of the sidewalk in an ordinary manner unsafe. To this end it is the duty of the city to inspect its sidewalks in a reasonably careful manner for the purpose of ascertaining whether or not they are safe for public use. . . .

Id. at 78. The Supreme Court had no problem with the quoted section of the jury instruction. The City of Seattle’s appeal was denied.

The City of Seattle not only has a duty to inspect its sidewalks, but since at least 1918 the courts of Washington have found that such inspection must be in a reasonable and careful manner for the purposes of ascertaining whether those sidewalks are safe for public use. Id. The City of Seattle denies the duty and admits it does not inspect.

The City of Seattle has a clear duty to use reasonable care to maintain its sidewalks. This duty imposes a duty to inspect. At minimum failure to inspect is evidence from which a lack of reasonable care can be inferred.

Summary judgment should not have been granted.

2. There is proof the sidewalk trip hazard which injured Larry Almo existed for years prior to his fall.

The City of Seattle argues constructive notice cannot apply because there is no proof of duration. There is such proof.

The trial court stated it had considered the declaration of Plaintiffs' expert arborist Favaro Greenforest in rendering its decision. CP 144; CP 265. No part of that declaration was stricken by the court in the original order granting summary judgment or in the order denying reconsideration. Id. The City of Seattle has not appealed the court's consideration of the Greenforest declaration.

As an arborist Greenforest is eminently qualified to comment on the subjects described. The City of Seattle's objections raised here might be suitable subjects of cross examination, but they are not grounds for exclusion, particularly where no motion for exclusion was made in the lower court and where the court specifically included the declaration as something it considered.

Further, the City of Seattle presented no evidence disputing any of the opinions expressed by Greenforest. Only the City of Seattle lawyer tried to dispute the opinions and then only by arguing on appeal that the declaration needed to include more background information on the formation of those opinions.

The Greenforest declaration establishes his credentials:

1. I am an I.S.A. Certified Arborist and an A.S.C.A. Registered Consulting Arborist. A copy of my CV is attached hereto as Exhibit A.”

CP 218. The declaration then establishes the foundations for his opinions:

2. The opinions contained herein are more probably true than not true. They are based on my expertise as a Consulting Arborist. They are also based on my inspection of trees and sidewalk in the vicinity of 6500 52nd Ave. South in Seattle and on my review of photographs taken of the sidewalk panel where Mr. Almo fell, and of the surrounding area.

CP 218. Greenforest then turns his attention to the particular trees

involved:

3. There are two trees in the vicinity of the sidewalk uplift that is the subject of this cause. One is a Norway Spruce; the other is a Lawson Cypress. The approximate age of those two trees is 90-110 years. It is likely that roots from either or both of said trees is responsible for the uplift of the panel of sidewalk which created the trip hazard leading to Mr. Almo’s fall with the most likely uplifting roots being those of the Lawson Cypress. A photograph of the trees is attached hereto as Exhibit B.

CP 218-9. Greenforest then discusses how the sidewalk uplift likely happened:

4. To lift a panel of sidewalk the size of the one involved here requires structural roots of a diameter that do not significantly expand outward once a tree has reached maturity. These trees would probably reached their mature size in approximately their 70th year, with limited growth and little structural root expansion beyond that point in time.

CP 219. Greenforest follows this with explanation of why he implicates the tree roots:

5. It is well known that tree roots are attracted to the underside of sidewalks. This is because there is increased oxygen, and increased moisture under sidewalks as compared to other areas. Exhibit C contains photographs showing root uplift in the area of Larry Almo's fall. A white paint stripe appears at the post repair location of the hazard that tripped Larry Almo.

CP 219. Greenforest states:

6. Uplift of the panel of sidewalk caused by tree roots is not a sudden event but would have occurred over a period of years. It is a slow process, easily anticipated.

CP 219. Greenforest concludes by stating:

7. Further, given the maturity of trees involved and the size of root necessary to cause the uplift here, it is probable this process of uplift was completed years before Larry Almo fell in 2008. Exhibit D is photographs taken by Ilyse Almo shortly after Larry Almo's fall which show the uplift which tripped him. The photographs provide further evidence that the uplift is not recent and likely took place years before Larry Almo's fall, given the obvious

weathering on the uplift edge which appears the same color as the weathering on the other parts of the sidewalk.

CP 219.

Greenforest thus gave his credentials, the foundation for his opinions and what his opinions were. The opinions are evidence supporting the existence of the trip hazard for years before Larry Almo's fall. The City of Seattle presented no evidence to the contrary; the City of Seattle has not appealed the lower court's inclusion of the Greenforest declaration in matters considered by the court.

The photo of the uplift taken shortly after Larry Almo's fall (before repair by the City) reveals the uplift as it appeared at the time of the fall. CP 210. The photo reveals grass growing at the joint of the uplift with the neighboring panel. This is further evidence supporting the existence of the uplift for some time.

Favoro Greenforest's conclusion was also supported by a witness. On reconsideration Plaintiffs submitted an additional declaration – that of Moan Mao. CP 205. Moan Mao stated he made his declaration from personal knowledge. He stated he was familiar with the location where Larry Almo fell because he mowed and edged grass at the location. He stated the sidewalk panel uplift which tripped Larry Almo had been present and at the same height as the day Larry Almo fell for at least 6 or 7

years. This is consistent with the Greenforest opinion. This is consistent with the photographic evidence.

The City of Seattle has stated the court did not consider the Moan Mao declaration on reconsideration. In fact the court specifically included the Moan Mao declaration as one of the things considered. CP 266. There was no exclusion of the Moan Mao declaration by the court, and the City of Seattle did not appeal its inclusion. Further, if the City had appealed inclusion of Moan Mao's declaration, it could only prevail by establishing the court's inclusion of the Moan Mao declaration in its consideration was an abuse of discretion by the court, which it clearly was not.

The City of Seattle's complaint that Moan Mao fails to establish the location of the uplift is inaccurate. Moan Mao states he speaks from personal knowledge and specifically states he refers to the panel uplift which tripped Larry Almo. This is a precise definition of the location. If the City of Seattle wants to test the accuracy of Moan Mao's statement, it is properly done on cross examination. For purposes of the summary judgment Moan Mao should be taken at his word.

Moan Mao's declaration is not needed to establish a time frame for constructive notice. The Greenforest declaration establishes time frame by itself. Moan Mao's declaration merely proves Greenforest's opinions are correct.

There is proof in the record of uplift existing for years. This is sufficient time to make the issue of constructive notice a jury question.

Summary judgment should not have been granted.

3. The City of Seattle cannot avoid its duty to maintain sidewalks in a reasonably safe condition by delegating that duty to adjacent landowners.

Seattle argues its failure to inspect sidewalks for hazard is not evidence of breach of its duty to maintain sidewalks in a reasonably safe condition because it expects adjacent landowners to report sidewalk hazards to it. However, the fact that the City of Seattle expects adjacent landowners to report sidewalk hazards does not establish as a matter of law that Seattle has reasonably met its own duty to maintain, particularly where, as here, there is no evidence that the City has made any effort to inform adjacent landowners of its reliance or of what constitutes hazard. For example, although City of Seattle employee Joe Taskey may recognize a sidewalk panel uplift of ½ inch to an inch constitutes a hazard (CP 167-8), it seems doubtful the average adjacent landowner would be aware of this and know to report it.

However, even if one were to assume the City of Seattle was populated by sophisticated and aware adjacent landowners, the City could not avoid its duty. The duty owed by the City to its pedestrians is

nondelegable and not avoided simply because an adjacent landowner might also have a duty.

It would be well and good if Seattle used reports of sidewalk hazards by adjacent landowners as a safety net to discover hazards it does not discover itself. However, the City's use of adjacent landowner reports as its only "proactive" method for detecting sidewalk hazards presents at minimum a question of fact as to whether it is using reasonable care to fulfill its duty.

Summary judgment should not have been granted.

4. The City of Seattle cannot avoid its duty to maintain reasonably safe sidewalks by arguing poverty.

Despite protestations to the contrary, the City of Seattle attempts to raise a poverty defense. The City of Seattle cannot avoid its duty to pedestrians by pleading poverty.

The City of Seattle makes reference to allocation of resources. It suggests a manpower shortage. It implies a large human resources expenditure is required to inspect its sidewalks proactively. It suggests it must rely on adjacent landowners to inform it of sidewalk safety issues, again implying it lacks the resources to do it itself. The City speaks of targeting areas when funds are available.

Seattle argues Bodin v. City of Stanwood, 130 Wn.2d 726, 927 P.2d 240 (1997) supports this line of defense. The argument misunderstands Bodin.

Bodin involved suit against the City of Stanwood for damages caused by flooding of the Stillaguamish River. Plaintiffs moved in limine to preclude the City of Stanwood from presenting evidence that it had insufficient funds to make repairs or changes in dikes to prevent flood waters from overflowing dikes. The City opposed the motion, stating it did not intend to claim the City lacked funds but argued the evidence was relevant to the reasonableness of the City's efforts. The trial court denied the plaintiffs' motion stating the question of reasonable efforts was for the jury.

At trial the City of Stanwood presented evidence of its efforts to obtain grant funds. Plaintiffs then presented evidence that the City had sufficient funds to raise the dikes with grant funds.

The jury returned a verdict for the City of Standwood on the claims of negligence and nuisance. Plaintiffs appealed, claiming an instruction should have been given establishing a lack of funds or a desire to use state or federal funds was not a defense to the City's failure to raise the dikes.

On appeal the Supreme Court in Bodin affirmed the jury's verdict.

However, the affirmance was not based on the lack of funds being a permissible defense:

As this opinion will explain, the City did not assert a "defense" based upon lack of funds or the desire to use grant money. Instead, its attempts to obtain grant funds constitute admissible evidence on whether the City acted reasonably under the circumstances.

Id. at 733. The court noted:

Whether one charged with negligence has exercised reasonable care is ordinarily a question of fact for the trier of fact.

Id. at 735. The Bodin court then found admission of the evidence for purposes of establishing reasonableness of response was not an abuse of discretion by the trial court.

Bodin was a 4-4-1 decision by the Supreme Court. Four justices found the City of Stanwood should not have been permitted to submit evidence of its efforts to obtain state and grant funds to the jury. Those justices found the evidence irrelevant with the only recognizable purpose being in fact a poverty defense. The majority prevailed because the fifth judge filed a concurrence which stated he agreed it was probably an impermissible poverty defense but that the error in admitting the evidence was harmless.

Bodin thus merely holds that it was not reversible error for the trial court to admit evidence at trial of fundraising efforts by the City to establish reasonableness. In contrast in the case at bar, by granting summary judgment, the trial court found the efforts of the City in maintaining safe sidewalks were reasonable as a matter of law. The Bodin opinion holds this should be decided by a jury.

The Washington Supreme Court in Bodin stated:

Negligence is generally a question of fact for the jury, and should be described as a matter of law only in the clearest of cases and where reasonable minds could not have differed in their interpretation of the facts. This is not the case where the negligence issue should be taken from the jury; reasonable minds could differ on the question whether the City was negligent.

Id. at 741 [citations omitted].

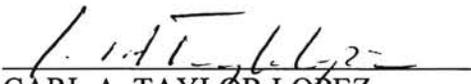
Summary judgment should not have been granted in this case.

CONCLUSION

The order granting summary judgment should be vacated. This cause should be remanded for trial.

Dated this 1st day of June, 2012.

LOPEZ & FANTEL, INC., P.S.


CARL A. TAYLOR LOPEZ,
WSBA No. 6215
Of Attorneys for Appellants

No: 67723-3

COURT OF APPEALS, DIVISION I
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LARRY ALMO and ILYSE ALMO, husband and wife, ESTHER ALMO,
a minor child, by and through her mother, ILYSE ALMO,

Plaintiff/Appellant

vs.

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Defendant/Respondent

CERTIFICATE OF SERVICE

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Tel: (206) 322-5200

ORIGINAL

1 I, Cynthia L. Ringo, declare and state as follows:

2 1. I am and at all times herein was a citizen of the United States, a resident of
3 Snohomish County, Washington, and am over the age of 18 years.

4 2. On the 1st day of June, 2012, I caused to be served the following documents on
5 counsel as follows:

- 6 • Appellants' Reply Brief; and
- 7 • Certificate of Service.

8 Washington State Court of Appeals
9 Division I
10 600 University St
11 One Union Square
Seattle, WA 98101-1176

12 [] via email
13 [] via Fax: :
14 [] via ABC legal messenger, regular run
[X] via U.S. regular mail (original plus one)
15 [] e-service through King County e-filing

16 Jeffrey M. Cowan
17 Assistant City Attorney
18 600 Fourth Avenue, 4th Fl
PO Box 94769
Seattle, WA 98124-4769

19 [X] via email Jeffrey.Cowan@seattle.gov
20 [] via Fax: : (206) 684-8284
[] via ABC legal messenger, regular run
21 [X] via U.S. regular mail
[] e-service through King County e-filing

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

24
25
26 CERTIFICATE OF SERVICE - 2

LOPEZ & FANTEL
2292 W. Commodore Way,
Suite 200
Seattle, WA 98199
206.322.5200

1 Dated at Seattle, Washington, this 1st day of June, 2012.

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3 Cynthia L. Ringo

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