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No. 67931-7-1

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

NANCI MILLSON, Appellant

v.

CITY OF LYNDEN, TIM & HELEN NEWCOMB, Respondents.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In its Answering Brief, Lynden attempts to dodge accountability for the dangerous condition of its sidewalk on Dogwood Street (where Nanci Millson tripped and fell) by suggesting that Nanci “became distracted and tripped over a crack exactly like the others that she had seen and avoided” (page 2), such that she was not owed any duties by Lynden. Lynden’s “open and obvious” argument is necessarily without reference to that portion of Nanci’s deposition where she stated that on the day of her walk/fall, she noted sidewalks in very poor condition “in the south side of Greenfield Village”, on Cherry Street (CP 81, 84), but when she got to Dogwood Street, where she fell, she observed that the sidewalk there was in better condition (CP 85: p. 62, lines 5-13), such that she was able to “pick up speed because the sidewalks, I thought, were better than where I had been” (CP 81: p. 31, lines 18-21).

Lynden’s “open and obvious” argument is also without legal authority to support the application of the defense to this case, where the defense is based on sidewalk conditions in sidewalks located in areas where Nanci did *not* trip and fall. Nanci submits that the proper focus of the “open and obvious” defense is the sidewalk lift where she *did* fall.

This reply brief is submitted to respond to the argument raised by Lynden.

REPLY TO LYNDEN'S STATEMENT OF THE CASE

A. STANDARD OF REVIEW

1. **The Standard of Review on Appeal is *De Novo*; There Should Be No Deference To The Trial Court's Findings**

Lynden asserts that where the trial court has made a finding of “actual knowledge” on the party of Nanci Millson, “that finding is entitled to deference by this court”, citing *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011), and *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003). Nanci Millson disagrees with Lynden's reference to such “deference” to the trial court's findings, and cites *Dolan, supra*, at pp. 26-27, in support of her view of the law:

Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court. Washington has thus applied a de novo standard in the context of a purely written record where the trial court made no determination of witness credibility. See *Smith*, 75 Wash.2d at 719, 453 P.2d 832.

Lynden also mistakenly cites *In re Marriage of Rideout, supra*, in support of its “deference” point. At page 351 of *Rideout*, the court states:

We hold here that the Court of Appeals correctly concluded that the substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved. The application of the substantial evidence standard in cases such as this is a narrow exception to the general rule that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases de novo because that court is in the same position as trial courts to review written

submissions. See, e.g., Smith, 75 Wash.2d at 718-19, 453 P.2d 832.

In short, the applicable standard of review of the trial court's ruling is *de novo*.

B. STATEMENT OF FACTS

1. Misleading Statements of Fact By Lynden

Lynden's brief contains misleading statements of fact, two of which are significant:

a. Nanci "had walked on Dogwood Street (where this fall occurred) a few times before" (page 4)

In fact, Nanci had only walked on Dogwood Street (where she fell) a couple of times before the fall (CP 80: p. 28, lines 23-25) – *and that had been a year or two earlier* (CP 85: p. 61, line 20, through p. 62, line 4). Furthermore, *she had never before walked in that direction* on the side of the street where her fall occurred. (CP 85: p. 61, lines 21-24).

b. "On previous occasions, Millson had noticed that, throughout Greenfield Village, there were multiple places where the sidewalks had cracked and lifted" (page 4)

In fact, the directions Nanci had walked in on dates before the accident had no problem areas, including any major sidewalk cracks or lifts (CP 80: p. 28, lines 3-9).

Nanci does not dispute that on the day of her walk/fall, she noted sidewalks in very poor condition "in the south side of Greenfield Village", on Cherry Street (CP 81, 84), but, again, when she got to

In his deposition, Roger testified that he did not actually see his wife fall because it happened so quickly. "One moment we were standing there together; the next moment she was on the pavement." CP at 40-41. Roger returned the next day to photograph the location, but he did not measure the stairs. He was not certain precisely how far PMC's merchandise protruded onto the boardwalk on the day of the incident.

Seiber did not remember any specifics about her fall. She thought the boardwalk was too narrow, but did not recall any defects in the boardwalk or the steps. She concluded, "If everything would have been right, I wouldn't have fallen." CP at 195. According to Seiber, either the merchandise was taking up part of the boardwalk or the boardwalk was too narrow.

At page 739 of the opinion, the court addresses causation and duty issues that are not present in Nanci Millson's claim – the lack of a causal connection between the defendant's use of the boardwalk and any alleged defects, and the possibility that Seiber should have sued the city or port of Poulsbo because of a defectively designed boardwalk:

Seiber does not allege that the merchandise display caused a defect to develop in the boardwalk. This contrasts with the cases she cites in which the defendant's special use gave rise to a physical defect that caused injury.

Seiber does not allege that PMC's merchandise warped the boardwalk or damaged the boards in any way. Instead, she alleges that the boardwalk was deficiently designed and built. Because she does not draw a causal connection between PMC's use of the boardwalk and the alleged defects, Seiber has not shown any possible breach of duty through PMC's special use. To the extent that the boardwalk may have been unsafe for pedestrians because of a defective design, Seiber has a cause of action against the entity (either the city or port of Poulsbo) responsible for the boardwalk. She does not have a cause of action against the owner or occupier of the adjacent building.

Furthermore, although she alleges that PMC's merchandise "filled a large area of the thoroughfare," she does not provide specific facts about where the merchandise was or how much

oh, if I only could grab something, and there was nothing but air. So I yelled to her [sister], and by the time she came, I was in the ditch; I just lunged right into it.'

* * *

The appellant testified she had taken the same walk along the excavation in the rear of the apartment house on previous occasions; the last time, prior to her accident, about a week before her injury. As stated by the trial judge:

'Well, the hazards involved in walking down this sidewalk by Mrs. Bailey must have been known to her; from her own testimony she had walked down there several times. They were open and apparent, and she says, in effect, what is a very natural thing for a person to do, and especially one unfortunately convalescing and not being able to get around much. Construction is always a tempting sight to every normal person. * * * So she very naturally (and I am not criticizing her for doing it) wanted to walk down and see how the work was progressing.'

'However, when she did that, she knew just as much about the dangers inherent in the situation as anyone could have known. It was broad daylight, a bright day on the day it happened. She had been down there Before . She lived in the apartment adjoining; and what is more, she was aware of her own infirmities better than anyone else could be.' (Italics ours.)

The appellant appears to come clearly within the maxim *volenti non fit injuria*. She voluntarily exposed herself to the danger of walking along the sidewalk near the open unguarded ditch with the knowledge of her physical infirmity. The risk or danger of falling into the excavation when walking near the edge, by placing her cane on obvious soft and insecure ground instead of the sidewalk, in view of her infirmity, was so obvious that she must be presumed to have comprehended it.

Lynden also cites *Howard v. Horn*, 61 Wn.App. 520, 810 P.2d 1387 (1991), which is distinguishable, as well. *Howard* involved a discussion of a landlord's duties to a tenant where non-safety glass was a

“latent” defect, and “uneven cement and lack of a handrail were patent defects”. (*Id.*, at 524) *Howard* doesn’t address a municipality’s duties to users of its sidewalks, and the uneven cement and lack of a handrail in *Howard* were *patent* defects because the tenant had seen these problems on numerous occasions.

2. Nanci Millson Did Not Have “Actual Knowledge” of the Defective Condition of the Sidewalk Where She Fell

First, Lynden asserts that Nanci had “actual knowledge of the condition of the sidewalk” (page 13). In support of that assertion, Lynden refers to Nanci’s description of the sidewalk condition on *Dogwood* Street (where she fell) as observed by her *after* her fall (CP 83-84), and on *Cherry* Street (where she observed sidewalks in poor condition and walked on the street), where she did *not* fall.

Second, Lynden asked the trial court – and now this court – to presume that what Nanci observed on *Cherry* Street – sidewalks in poor condition -- was the same as what she observed on *Dogwood* Street (where she fell). Specifically, Lynden’s argument is that “she had, in actuality, *already* noticed the broken and cracked sidewalks, on this particular walk, on this particular day, and *had realized* she needed to exercise additional caution in this area.” [Emphasis in original] CP 17. However, Nanci’s deposition testimony was contrary to any such presumption. On the day of her walk/fall, she noted sidewalks in very poor condition “in the south side of Greenfield Village”, on *Cherry*

Street (CP 81, 84), but when she got to *Dogwood* Street, where she fell, she observed that the sidewalk there was in better condition (CP 85: p. 62, lines 5-13), such that she was able to “pick up speed because the sidewalks, I thought, were better than where I had been” (CP 81: p. 31, lines 18-21).

The extent of Nanci’s awareness of sidewalk conditions on the streets she walked on the date of her accident is discussed by her in portions of her deposition that were not quoted by Lynden in its summary judgment motion (CP 98-106), or in its appellate brief. Specifically, the fall occurred in Greenfield Village (CP 80: p. 25, lines 19-20), which was a “safe neighborhood for walking”, and she had never tripped before while walking through Greenfield Village (CP 81: p. 29, lines 6-13); there were no similarly dangerous sidewalk areas anywhere else in the Greenfield Village area (CP 83: p. 40, line 24, through p. 41, line 2).

B. NANJI MILLSON’S OBLIGATION TO WATCH HER FEET AND NOT “WALK BLINDLY”

Lynden (at page 14 of its brief on appeal) argues that “plaintiff cannot claim the ‘privilege’ that other pedestrians may be afforded – to walk blindly and assume that they will not encounter hazards.”

However, Lynden has not responded to Nanci’s reference (in her opening brief on appeal) to a case involving similar facts and the same argument as Lynden is making: *Blasick v. City of Yakima*, 45 Wn.2d

309, 313-314, 274 P.2d 122 (1954). In noting that “Appellant strenuously urges that the injured pedestrian 'was not looking where she was walking,' and that the 'depression was plainly visible, open, obvious and apparent’”, the Court, at 313-314, rejected the argument that a pedestrian is required to keep his eyes on the walk immediately in front of him at all times.

Indeed, *none* of the other cases cited by Nanci in her opening brief on appeal regarding a pedestrian’s obligation to watch her feet at all times are discussed in Lynden’s brief, including the holding in *Clevenger v. The City of Seattle*, 29 Wn.2d 167, 169-170, 186 P.2d 87 (1947), where the Supreme Court disapproved Lynden’s argument, quoting with approval the following passage from *Mischke v. City of Seattle*, 26 Wash. 616, 621, 67 P. 357 (1901):

One has a right to travel upon the street on the darkest night without a lantern, relying upon the performance of their duties by the authorities in keeping the streets in a suitable condition for travel. . . .”

CONCLUSION

Lynden does not dispute that harm was caused to Nanci Millson because of the manner in which Lynden permitted trees to be planted in the area of Nanci’s fall. Nor does Lynden dispute that Lynden knew or reasonably should have known that the tree’s roots would eventually cause a sidewalk lift that would endanger members of the public who used the sidewalk. Furthermore, Lynden does not dispute that, for a

period of years, it failed to inspect the sidewalk and fix the sidewalk lift that caused Nanci's accident. Instead, Lynden asks this court to assume that the sidewalk lift of 1.5 to 2 inches was "open and obvious".

Lynden's only argument on appeal – that the condition that caused Nanci to fall was "open and obvious" – is based on the poor condition of sidewalks in *several areas of several blocks of a neighborhood*. Put another way, Lynden asks this court to relieve it from its duties to pedestrians using any of the sidewalks in an entire neighborhood in Lynden because Lynden failed to maintain *any* of the sidewalks in the neighborhood – a result which would effectively relieve a municipality from any duty to maintain safe sidewalks by simply ignoring any such duty, thereby permitting the sidewalks to become increasingly dangerous throughout the neighborhood, such that the dangerous conditions become "open and obvious".

Lynden's motion for summary judgment should be denied, and Nanci's motion for partial summary judgment re liability against Lynden should be granted.

DATED this 11th day of May, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below I served via e-mail and U.S. Mail, First Class postage prepaid, a full and correct copy of the foregoing APPELLANT'S REPLY BRIEF on the following parties at the following addresses:

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