

71117-2

71117-2

No. 71117-2-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JOSEPHINE JOHNSON,

Appellant,

v.

CITY OF EVERETT, DONALD and PATRICIA KRASSIN,

Respondents.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 25 PM 4:54

REPLY BRIEF OF APPELLANT

Alicia M. Kikuchi, WSBA No. 40613
ALICIA KIKUCHI LAW FIRM, PLLC
Attorneys for Appellant
1860 NW 195th Street
Shoreline, WA 98177
(206) 629-5240 x106

 ORIGINAL

REPLY BRIEF OF APPELLANT

A. ARGUMENTS

1. **Johnson Does Not Need to Prove the Exact Time the Defect Existed Prior to Her Fall.**

Johnson agrees that she must show the defective condition existed for such a time the City had the opportunity to correct the defect, but the City overlooks that she need not prove the exact time the defect existed before her fall. In *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962), the Supreme Court of Washington was presented with a similar question as to whether or not the plaintiff presented sufficient evidence on constructive notice. The plaintiff in that case alleged she slipped on a banana peel that was on the floor of a grocery store. *Id.* at 672. To establish her constructive notice claim, the plaintiff presented evidence of the floor being dirty, which countered the store's argument that it was recently cleaned and inspected, no one was seen eating a banana for several minutes prior to her fall, and the dark coloring of the banana peel. *Id.* at 674. The Court noted it would be the rare case in which the exact time could be proved. *Id.* It then went on to hold that there was sufficient and substantial circumstantial evidence upon which the jury could have found constructive notice. *Id.* at 675.

In the present case, Johnson and her walking companion, Kristen Anderson, testified that the defect that caused Johnson's fall was not a normal crack. Johnson described it as a hole with plenty of cracks. CP 207. She further testified she was not sure of the size of the hole, but she believed her foot was able to go all the way in the hole. CP 207. In addition, Johnson noted there was grass growing within the cracks. CP 210. According to Ms. Anderson, this defect was not a normal crack in the sidewalk, and she had never seen a something "big like that" without being marked with a warning. CP 214. This evidence, when viewed cumulatively as in *Presnell*, allows reasonable minds to conclude that the defect, given its size and grass growing within it, existed for such a time that the City should have discovered its existence.

2. Joellen Gill is Competent to Testify.

In addition to being a human factors expert, Ms. Gill is also a certified Safety Professional. CP 86, 94. She has spent the last 15 years analyzing incidents similar to Johnson's fall. CP 86. She has testified as an expert in numerous trials, depositions, and arbitrations in several states. CP 97 – 99. Unfortunately for all parties, Ms. Gill was not able perform her own measurements of the defect because it was repaired shortly after the City was notified of its existence. CP 88, 90. This does not render

Ms. Gill's analysis unqualified; rather, the fact that Ms. Gill was unable to personally view the defect goes to the weight of her testimony.

Many experts rely on deposition transcripts and documents created by someone other than themselves to render opinions. For example, defendants in personal injury cases often retain medical experts to conduct a review of the plaintiff's medical records and render an opinion on causation, reasonable of treatment, etc. In these situations, the medical expert never physically exams or even speaks to the injured plaintiff. The experts are allowed to testify, and it is the jury's job to weigh that testimony against the rest of the evidence produced.

3. Ms. Gill's Testimony is Admissible.

Ms. Gill's testimony was presented in a letter attached to Johnson's counsel's declaration. The fact that Ms. Gill's testimony was not in the form of a sworn affidavit or declaration is not fatal to the testimony itself.

The City cites *Kim v. Lee*, 174 Wn. App. 319, 300 P.3d 431 (2013), as the definitive case on this topic. In that case, the plaintiff brought a medical malpractice action against his former dentist. A necessary element of any medical malpractice claim is negligence. In order to establish negligence, the plaintiff must submit medical testimony that the care rendered by the defendant was below the reasonable standard

of care. Without this testimony from a medical provider, the plaintiff cannot prove his or her case. The plaintiff in *Kim* relied a letter from his expert to prove negligence and causation, two necessary elements of his claim.

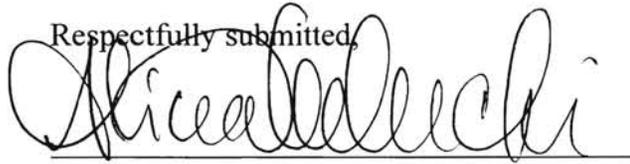
In the present case, Johnson did not present Ms. Gill's testimony as proof The City acted negligently. Rather, it was one piece of evidence, to be evaluated together with Johnson's testimony, Ms. Anderson's testimony, and the photographs. Ms. Gill's testimony is not necessary for Johnson to prevail in her case. While it may be foolish for Johnson or any plaintiff to proceed in a case such as this without expert testimony, there is neither case law nor court rules that mandate expert testimony on this particular issue. Therefore, this situation can be distinguished from *Kim* because Ms. Gill's testimony does not purport to establish a necessary element of Johnson's claim.

F. CONCLUSION

Johnson has submitted sufficient evidence regarding the time the alleged defect existed. Moreover, Ms. Gill is competent to testify on the condition of the defect, and her testimony should be deemed admissible. Johnson once again respectfully requests that this Court reverse the trial court's dismissal of her claim and allow her action to proceed to trial.

DATED this 25th day of March 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alicia M. Kikuchi". The signature is written in a cursive style with a horizontal line underneath it.

Alicia M. Kikuchi
Attorney for Appellant
WSBA # 40613

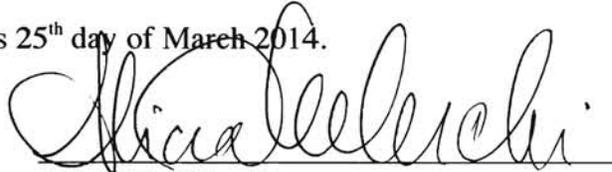
CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Reply **Brief of Appellant** by hand delivery a full, true, and correct copy thereof on the date set forth below.

Colin A. Olivers
Office of the City Attorney
2930 Wetmore Ave, Suite 10-C
Everett, WA 98201

Kelsey M. Russell
Law Offices of Sweeney, Heit & Dietzler
1191 Second Avenue, Suite 500
Seattle, WA 98101

DATED this 25th day of March 2014.



Alicia M. Kikuchi

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR 25 PM 4:55