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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MITCHELL KANE,

Appellant

v.

BETHANY COMMUNITY CHURCH,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

On the night of July 9, 2014, appellant Mitchell Kane was returning home on a small motor scooter. While passing through an intersection, Mr. Kane was hit by an alcohol-impaired driver that failed to stop at a stop sign. The driver's view of the stop sign was obstructed by tree branches. Mr. Kane suffered crippling, permanent injuries.

Evidence shows: (1) the driver was impaired by a blood alcohol level of .11 (the legal limit being .08) and (2) the stop sign he missed was obscured by branches of a tree that Bethany Community Church (hereinafter "Bethany") unlawfully neglected to trim.

Mitchell Kane sued Jonathon Hilton for driving under the influence and Bethany for unlawfully failing to trim tree branches that blocked the view of the stop sign.

The City of Seattle was also originally a defendant on the theory that it failed to enforce its street tree-trimming ordinances. The City is no longer a party.

Driver Hilton admitted his fault. However, Bethany argued on motion for summary judgment that the visual obstruction of the stop sign was not a contributing proximate cause of the accident.

Summary judgment was granted dismissing both Bethany and the City. The Order dismissing the City is not challenged on appeal. Trial has been stayed to allow appeal of the dismissal of Bethany.

II. ASSIGNMENTS OF ERROR

1. It was error to dismiss plaintiff's claims against Bethany on summary judgment.

Issues Pertaining to First Assignment of Error.

- (1) What was Bethany's duty re: its street trees?
- (2) Is there evidence that Bethany was at fault for allowing tree branches to visually obstruct the defendant driver's view of the stop sign?
- (3) Could a jury reasonably infer that the view obstruction of the stop sign was one of the proximate causes of the intersection accident?

2. It was error to deny plaintiff's motion to amend his Complaint to allege a nuisance claim.

Issue Pertaining to Second Assignment of Error.

Should the trial court have allowed amendment of the Complaint to allege that a tree that obstructs a driver's vision of a stop sign is a nuisance?

III. STATEMENT OF THE CASE

A. Bethany's Violation Of City Code.

On January 14, 2008, defendant Bethany Community Church "Bethany" and defendant City of Seattle "City" entered into a Street Use Permit. (Nichols Dec., Ex. K.) CP 91. The permit allowed Bethany to plant 6 parkway maple trees in the city right of way on Stone Avenue North. As a condition of the permit the City required that defendant Bethany maintain the trees in compliance with all applicable City Ordinances, state and federal law. The permit also required Bethany to defend, indemnify and hold the City harmless for any loss resulting from Bethany's failure to fully perform its duties under the permit. There is a stop sign located on Stone Avenue at NE 80th. On July 9, 2014, Bethany's trees blocked oncoming traffic from seeing the stop sign. See photograph taken at the scene of the accident by City of Seattle personnel. (Nichols Dec., Ex. C.) CP 91. See, photographs taken July 10, 2014 (the day after the subject accident) (Nichols Dec., Ex. A and B.) CP 91.

SMC 15.43.040(A)(2) states:

Pruning Street trees in abutting places and trees on private property so that the trees do not obstruct streetlights, traffic signs, or signals, and views of streets or intersections. Street trees must meet the minimum height clearance requirements of 8 feet above the surface of the sidewalk and 14 feet above the surface of the street.

B. Hilton's Route After Consuming His Last Alcohol.

On July 9, 2014, at approximately 7:00 – 7:30 p.m., Defendant Jonathan Hilton and two friends, Hunter Van Horn and Sean Novak, took an 18 pack of beer to Volunteer Park (Hilton Dep., Vol. 1, p. 8; Nichols Dec. Ex. F.) CP 91. Hilton consumed five or six beers over the next two hours before Hilton drove to the Rio Bravo restaurant for dinner with his friends. (*Id.* p. 9) CP 91. (A distance of 1.4 miles per Google Maps). They left the restaurant around 10:00 – 10:30 (*Id.*) CP 91. Hilton drove with his two friends in his car. Hilton first dropped off Van Horn – another five –to twenty minute drive estimated as around five miles (Hilton, Dep., Nichols Dec. Ex. F.) CP 91. After dropping off Van Horn, they proceeded on Interstate 5 North to the 85th Street exit and then West on 85th to Stone Avenue North where they took a left and proceeded south. (Novak Dep., p. 10, l. 3 – p. 11, l.17; Nichols Dec., Ex G.) CP 91. Hilton had not driven this route to Novak's home prior to that evening. CP 91. Novak testified that during the drive from Volunteer Park, Hilton's was staying in his lane, had no problems yielding to traffic, did not have any problems taking the exit off I-5 and was observing the speed limit. (Novak Dep., p. 12 l. 21- p. 13, l. 16; Nichols Dec., Ex. G.). Novak testified that Hilton

made a successful stop at the stop sign at the intersection of Green Lake Drive North and Stone Avenue. (Novak Dep. p. 19, ll. 15-24; Nichols Dec., Ex. G.) CP 91. That stop sign is one block immediately prior to the intersection of the collision at North 80th and Stone Avenue North. CP 91.

C. Hilton's Testimony Regarding The Trees Blocking The View Of The Stop Sign.

Hilton first testimony regarding the trees were in his interrogatory answers he testified that:

"...I didn't see the stop sign until I got to it; I remember the trees being there but currently have no recollection of whether they obscured my vision."

Hilton Dec., p. 13, ll. 13-16; (Nichols Dec., Ex. F.) CP 91.

Hilton explained his answer in his deposition as follows:

Q. My question is, "I didn't see the stop sign until I got to it." Can you tell me what you mean by that?

A. So as you are coming up to the stop sign, I didn't see it until I got up to it. So I was coming up pretty quickly, he pointed out that there is a stop sign. So that's when I looked over and saw it and went to slam on my brakes and that's when the accident happened. (Hilton Dec., p. 13, l. 19 – p. 14, l. 2; Nichols Dec., Ex. F.) CP 91.

During Hilton's deposition he viewed Exhibit "7", the photograph that was taken by City of Seattle personnel the day after the July 9, 2014, accident. The following testimony was elicited:

Q. (By Mr. Nichols) Mr. Hilton, you have been handed what's been marked as Exhibit No. 7. If you can review that document.

A. Okay.

Q. Have you seen that photograph before?

A. I have not, no.

Q. Do you know what that photograph is?

A. I am assuming it's a

MS. SHARIFI: Objection, speculation.

A. I am assuming it's a picture of the scene from the accident.

Q. (By Mr. Nichols) Have you seen it before?

A. No, I have not.

Q. This photograph was produced by the City in response to our discovery request. For the record, it's SEA 000127 for a Bates number. I will represent to you that it is the photograph taken by Seattle City Police. Does this picture refresh your recollection of the accident site on July 9, 2014?

MS. SHARIFI: Objection; form, foundation.

MS. FIRST: Objection, form.

Q. (By Mr. Nichols) You can go ahead and answer. Do you understand my question?

A. Yeah. Yeah. This is looking down Stone, 85th or 80th is off to the left. Yeah, I recognize it.

Q. And in your answer to Interrogatory 12, you say, "I remember trees being there but currently have no recollection of whether they obscured my vision." Can you tell us which trees in this picture you are referring to?

MS. FIRST: Object to the form.
MS. SHARIFI: Join.

A. Those trees right in there.

Q. (By Mr. Nichols) So the witness is pointing to the trees that would be on the west side of Stone Avenue; is that correct?

A. Yes.

Q. Okay. So does this refresh your recollection of whether the trees obscured your vision at all?

MS. FIRST: Object to the form.
MS. SHARIFI: Objection; foundation,

Speculation. And the photo is a singular depiction from a specific location taken on foot, it doesn't depict the entire scene.

MS. FIRST: Join.
MR. JOHNSON: Join.

Q. (By Mr. Nichols) Do you understand the question?

A. Yes. Seen from right here, it definitely, you know, looks like it is obstructing the view. So yes.

Q. Could you clarify what you mean by, "it's obstructing the view."

A. Yeah. It is obstructing the view of the stop sign to where I wouldn't be able to see it.

Q. When you say, "it's obstructing the stop sign..." Let me finish my question.

A. The branch.

Q. When you say it's obscuring my view of the stop sign, what are you referring to?

MS. FIRST: Object to the form.

A. I am referring to the tree.

Q. (By Mr. Nichols) And that would be the trees that would be on the right side of this photograph which is Exhibit 7.

A. Yes. (Hilton Dep., Vol. II, pp. 7-9; Nichols Ex. F-pt. 2.) CP 91.

IV. ARGUMENT

A. Bethany's Duty To Trim Its Tree.

Ownership of trees immediately adjacent to city streets carries special responsibility for the safety of the public. *Re v. Tenney*, 56 Wash. App. 394,396 (1989). The property owner's duty to make sure that its trees do not interfere with the view of traffic signs is incorporated in the Seattle Municipal Code.

SMC 15.43.040 – Maintenance of trees

A. Private Property owners are responsible for:

...

2. Pruning street trees in abutting public places and trees on private property so that the trees do not obstruct street lights, traffic signs or signals, and views of streets or intersections. Street trees must meet the minimum height clearance requirements of 8 feet above the surface of the sidewalk and 14 feet above the surface of the street. (Emphasis supplied)

SMC 10.52.030 – Duties of owners and occupants

...

B. In addition to duties the owner or occupant may have to abate nuisances, the owner or occupant of property shall:

...

2. Destroy remove or trim vegetation or parts thereof on the property, and which are also overhanging any sidewalk within (8) feet measured vertically from any point on the sidewalk;

3. Destroy, remove or trim vegetation or any parts thereof on the property or on adjacent planting strips, which encroaches on or overhangs the travelled portion of the street or alley within fourteen (14) feet measured vertically from any point on the street or alley.

These ordinances compel property owners to comply with the City's duty to keep its streets reasonably safe by removing branches that obstruct traffic signs. That duty was most recently repeated in *Wuthrich v. King County*, 185 Wn.2d 19 at ¶ 9 (2016), a case discussing the County's responsibility to remove naturally

occurring blackberry bushes alleged to obscure a drivers view at an intersection.¹

B. Factual Issue Presented On The Degree Of The Obstruction.

Bethany does not challenge the fact that its tree's branches blocked the view of the stop sign – but does claim a driver can adequately see around the branches when approaching the stop sign.

The parties rely on competing expert declarations to establish the actual distance at which an approaching driver's view of the stop sign remains obstructed.

- Plaintiff's expert, Edmonds Detective Steve Harbinson, stated that the stop sign was totally obscured at a distance of 100 feet and greater. The sign was not fully visible until within 90 feet of the sign. (Harbinson Dec., items G - I.) CP 93.
- Opposing expert witness, Seattle Detective Thomas Bacon, stated that the stop sign "was visible from a distance of approximately 120 feet away." CP 61.

¹ *Wuthrich* (at ¶ 11) also notes that summary judgment is not proper because factual issues were presented on "reasonable care" and "proximate causation."

At the time of the collision, plaintiff Mitchell Kane was traveling eastbound on N. 80th Street, an arterial that connects SR-99 (Aurora) and I-5. Because this street connects primary or secondary state highways, the street's traffic devices are subject to the directions of the Washington State Department of Transportation (WSDOT). RCW 47.36.060²

The WSDOT Traffic Manual sets minimum standards for preventing vegetation from obscuring traffic signs. It specifies that full view of the sign face must be visible when drivers reach 200 feet from the sign on low speed urban streets. (WSDOT Traffic Manual M51-02-05 § 2.3 (4)) (Copy attached as Appendix 1 and referenced in the Harbison Dec, p. 4.) CP 93.

The WSDOT Design Manual directs traffic engineers to apply a stopping sight distance of 155 feet for streets designed for the slowest 25 MPH traffic. (WSDOT Design Manual (922-01.10) (Copy attached as Appendix 2.) Again, the stopping sight distance

² RCW 47.36.060 **Traffic devices on country roads and city streets**

...
The traffic devices, signs, signals, and markers shall comply with the uniform state standard for manufacture, display, direction, and location thereof as designated by the department. The design, location, erection, and operation of traffic devices and traffic control signals upon such city or town streets constituting either the route of a primary or secondary state highway to the city or town or connecting streets to the primary or secondary state highways through the city or town shall be under the direction of the department. . .

was far more than the distance the obscured stop sign could be seen.

C. Sight Distance Standards Violated by Branches.

As set out above, the competing experts found the branches completely hid the sign until a driver approached to within 100 or 120 feet of the stop sign. Either measurement is far short of the 200 feet uniform minimum required for this arterial stop sign.

D. Sufficient Evidence of Negligence is Supplied by Bethany's Violation of Street Tree Pruning Ordinances and WSDOT Regulations.

By statute, breach of a duty imposed by ordinance or administrative rule may be considered evidence of negligence.

**RCW 5.40.050 Breach of duty--Evidence of negligence--
Negligence per se**

A breach of duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence.

The competing experts have both presented evidence of Bethany's violation of tree trimming ordinances and regulations sufficient to defeat summary judgment.

E. A Jury Could Reasonably Find The Obstruction Of The Stop Sign Was One Of The Proximate Causes Of The Accident.

Bethany argues that there is no evidence that visual obstruction of the stop sign was a contributing proximate cause of the accident. Bethany is mistaken.

- Driver Hilton said he did not see the sign in time to stop.
CP 91.
- Hilton's passenger stated that the tree blocked the view of the sign.
- Plaintiff's expert, Detective Harbinson, said the sign was sign not visible within the perception/reaction and stopping distance.
- The opposing expert's measurements show an "emergency" stop was necessary to stop within the sight distance of the sign.

A reasonable jury could well find that visual obstruction of the stop sign was one of the proximate causes of Mr. Hilton's failure to see the sign in time to stop.

F. Bethany's Claim that an Intoxicated Driver was the Sole Proximate Cause of the Accident.

In support of summary judgment, Bethany claims that Hilton's intoxication was the sole proximate cause of the accident as a *matter of law*. However, evidence of the degree of Mr. Hilton's intoxication falls well short of proving the obstructed stop sign could not have contributed to the accident.

It is undisputed that Mr. Hilton was impaired because he had a blood alcohol level of .11 g/100 mL. However, the degree to which individuals react alcohol varies. This blood/alcohol reading establishes negligence, but does not prove as a *matter of law* that Mr. Hilton would have ignored a properly visible stop sign.

A jury could reasonably infer that Mr. Hilton probably would have stopped if the sign had been visible at the distance required by law.

The "Walk and Turn" and the "One Leg Stand" field sobriety tests were within normal limits. In fact, it was noted that Hilton's "balance was excellent." (First Dec., Ex G., p. 23) CP 76.

- Even though Hilton was noted to be "emotionally shaken" and a "stutterer," his slight hesitations to perform verbal

backward counting and alphabet tests were not out of the ordinary. CP 76.

- Immediately before the accident, Hilton had successfully driven over 15 miles through a mix of residential and commercial streets and on I-5. (Per Google Maps)
- Hilton had stopped at all stop signs, including a stop sign, just two blocks before the accident intersection. CP 91.
- Hilton testified he did not see the sign until it was too late to avoid the accident. CP 91.
- When shown photos taken the day after the accident, Hilton identified the tree branches as the reason he did not see the sign in time to stop. (Hilton Dec., Vol. 2, pp. 7-9, Nichols Dec., Ex. F-pt 2.) CP 92.
- Detective Harbinson's investigation convinced him that the obstruction of the stop sign was a contributing circumstance to the accident. CP 93.

The issue of proximate causation is a normally a question of fact for the jury. *Dewer v. Smith*, 185 Wn. App. 544, 563 (2015). It was improper to resolve this issue on summary judgment.

G. The Nuisance Claim Should be Allowed.

1. The Trial Court erred in not allowing the amendment. CR 15 governs the amendment of pleadings and reads in pertinent part:

(a) Amendments: A party may amend his pleading once as a matter of course before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Leave to amend the pleading should be freely given unless it would result in prejudice to the non-moving party. *Kirkham v. Smith*, 106 Wash. App. 181 (2001), *Murphy Contractors, Inc. v. King County*, 112 Wash App. 192, 199 (2002).

There was no prejudice to the non-moving party. On August 19, 2015, the Trial Court granted Bethany a continuance of the trial date in this matter from December 7, 2015 until June 27, 2016. The discovery cutoff was extended to May 9, 2016. There was adequate time to investigate and respond to the nuisance claims.

2. Bethany's failure to maintain the trees pursuant to the SMC created a public nuisance in violation of state law and was a proximate cause of the July 10, 2014 accident.

The relevant portions of RCW 7.48 are:

RCW 7.48.010. Actionable nuisance defined:

The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

RCW 7.48.130. Public nuisance defined: A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.

RCW 7.48.140. Public nuisances enumerated

(4) To obstruct or encroach upon public highway, private ways, streets, alleys, commons, landing places, and ways to burying places or to unlawfully obstruct or impede the flow of municipal transit vehicles as defined in RCW 46.04.355 or passenger traffic, access to municipal transit vehicles or stations as defined in * RCW 9.91.025(2)(a), or otherwise interfere with the provision or use of public transportation services, or obstruct or impede a municipal transit driver, operator, or supervisor in the performance of that individual's duties; (Boldness added)

Bethany was permitted to grow trees on the City of Seattle's right of way. On the day of the accident, July 9, 2014, the tree

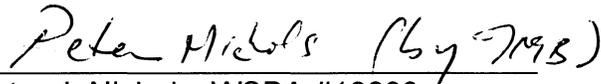
branches obstructed the view of the stop sign. (Nichols Dec., Exs. D and E., In Support of Leave to Amend) CP 72. Bethany's trees obstructed the stop sign and encroached on the street impeding traffic, which meets the definition of a public nuisance and is actionable under RCW 7.48.020.

V. CONCLUSION

There are genuine issues of material fact as to whether the intersection at Stone Way and NE 80th was reasonably safe for travel, whether Bethany breached its duty by failing to maintain its trees pursuant to the specifications in the Seattle Municipal Code and the WSDOT directives, and whether Bethany's actions or omissions were one of the proximate causes of Mitchell Kane's damages. The Court is asked to remand this case for trial with directions to allow amendment of the Complaint to allege a nuisance claim.

Respectfully submitted this 20th day of June 2016.

LAW OFFICE OF PETER J. NICHOLS

 (by ^{MS})

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APPENDIX 1

1260.03(1)(b) Design Stopping Sight Distance

Exhibit 1260-1 gives the design stopping sight distances for grades less than 3%, the minimum curve length for a 1% grade change to provide the stopping sight distance for a crest (K_c) and sag (K_s) vertical curve, and the minimum length of vertical curve for the design speed (VCL_m). For stopping sight distances when the grade is 3% or greater, see Exhibit 1260-2.

Design Speed (mph)	Design Stopping Sight Distance (ft)	K_c	K_s	VCL_m (ft)
25	155	<u>12</u>	<u>26</u>	75
30	200	<u>19</u>	<u>37</u>	90
35	250	<u>29</u>	<u>49</u>	105
40	305	<u>44</u>	<u>64</u>	120
45	360	<u>61</u>	<u>79</u>	135
50	425	<u>84</u>	<u>96</u>	150
55	495	<u>114</u>	<u>115</u>	165
60	570	<u>151</u>	<u>136</u>	180
65	645	<u>193</u>	<u>157</u>	195
70	730	<u>247</u>	<u>181</u>	210
75	820	<u>312</u>	<u>206</u>	225
80	910	<u>384</u>	<u>231</u>	240

Design Stopping Sight Distance
Exhibit 1260-1

APPENDIX 2

use of attention devices erodes their effectiveness and must be avoided. Therefore, permanent attention devices must be re-evaluated every six to 12 months for continued effectiveness and re-approved by the region traffic engineer.

(4) Controlling Vegetation Around Signs

The department's maintenance crews are responsible for maintaining visibility to signs by clearing vegetation that obscures the full view of a sign face. Thoughtful sign placement can reduce the need for vegetation control.

The following guidance will generally provide sign visibility. Greater clearing may be necessary in some situations to achieve full visibility to the sign.

Area Description	Distance	Width
Low Speed Urban	200 feet	Varies
Rural	500 feet	Varies
Freeways and All Guide Signs	800 feet	Varies

*Distance is measured in the direction that the sign faces, along the edge of the traveled way.

**Width varies. Clear vegetation from edge of pavement to 5 feet beyond the sign edge that is farthest from the roadway, or to the edge of the right of way.

Table 2-3

CERTIFICATE OF SERVICE

Linda Voss, declares under penalty of perjury, that on date noted below, she caused to be delivered a copy of Appellant's Brief via Email and Washington Legal Messengers to:

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Signed in Seattle, WA this 20th day of June 2016.



Linda Voss, Legal Assistant
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