

No. 286410

WASHINGTON STATE COURT OF APPEALS  
DIVISION III

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RHONDA JO GENNRICH,

Appellant

v.

CITY OF SPOKANE, a municipal corporation; JEAN COMBS AND  
JOHN DOE COMBS, husband and wife; and FRANCES HECKMAN and  
JANE DOE HECKMAN, husband and wife,

Respondents and Cross-Appellants

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APPELLANT'S REPLY BRIEF

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**A. STATEMENT OF THE CASE — REBUTTAL**

For purposes of this appeal, there is no dispute as to the existence of a sidewalk defect, nor the fact that Mrs. Gennrich tripped over that defect, nor the fact that she was injured when she tripped.

The City of Spokane argues that the trial court should have stricken paragraphs 15 and 16 of Dr. Corp's declaration, which state that the offset in the sidewalk was more probably than not caused by a tree root emanating from a tree adjacent to the sidewalk, and that the condition had existed in excess of twenty years. CP 103; Brief of Respondent, pp 12-13. The City contends that because Dr. Corp is not an arborist, and opinion regarding growth of a tree root, and consequent disruption of soil and the sidewalk structure is outside his training, education or experience. *Id.*

The facts surrounding Dr. Corp's professional experience, demonstrated on his C.V., shows that he possesses both experience and formal education with respect to earth and soil, and disruptions thereof. First, Dr. Corp possesses a Ph.D in civil engineering, and a masters degree in mining engineering. Second, he has specific experience with soil and structures, as reflected in the following C.V. excerpt:

Consulting Forensic Engineer in areas of fire investigation, vehicle accident reconstruction, injury

causation, construction accidents, slip-and-fall accidents, structural mechanics, product design, electrical systems, and geotechnical engineering (road construction, *drainage, slope stability, foundations, ground control*, tunneling)

Research Supervisor, Spokane Research Center, Dept. of Interior, U.S. Bureau of Mines (now NIOSH)--research on equipment development, electronic instrumentation, *tunneling and ground control*, geomechanics, fires and explosions, industrial hazards, human factors, accident analysis and risk assessment, reclamation, environmental problems, and ocean mining (Marine Minerals Technology Center).

CP 106. [Emphasis added.] As seen in the foregoing C.V. excerpt, Dr. Corp has extensive professional experience with: “*drainage, slope stability, foundations, ground control*, [and] *tunneling*” as well as “*ground control* [and] *geomechanics*.” The Respondent has omitted any mention of the foregoing education and experience.

The issue at hand is the likely effect of tree growth on the stability and movement of soil beneath a sidewalk, and the structural dislocation of that sidewalk — matters that are well within Dr. Corp’s experience and expertise. One need not be an arborist, in addition to holding doctorate and masters degrees in engineering (civil and mining) in order to form a professional opinion as to what damage probably resulted to a sidewalk from the extension of a large tree trunk into the soil and beneath that

sidewalk. See photos of tree stump and direction of tree growth to and beneath sidewalk: Declaration of Corp, CP 99, Exhibits 1 to 5.

The trial court dismissed Plaintiff's action based on the following opinion: "I think it would be difficult for the Court to find that a factual basis for constructive notice could be made out here." VRP 19. Otherwise stated, the trial court found that there were insufficient facts from which reasonable jurors could infer that the City of Spokane had constructive notice that the subject defect existed.

Dr. Corp concluded that a tree root caused unevenness of the sidewalk section, and that such defect had been present for more than twenty years. The *reasons* he gave for these conclusions were based upon the follow facts. First, there had been a large tree growing immediately adjacent to the sidewalk. Second, a large outgrowth of the tree trunk protruded to the edge and underneath the sidewalk. Declaration of Corp, CP 99, Exhibits 1 to 5. Third, the sidewalk sections immediately adjacent to the tree trunk are dislocated and uneven. Fourth, duration of the defect, i.e., more than twenty years, is based on the nature and extent of tree stump deterioration — which was clearly visible.

In summary, Dr. Corp did not merely state conclusions, but provided reasons for those conclusions, supported by physical facts in

evidence.

**B. ARGUMENT**

(1) Dr. Corp Is Qualified To Testify Regarding Cause and Duration of Sidewalk Defect

The City has not challenged Dr. Corp's qualifications as an engineering expert but, rather, contends the central issue is the scientific aspects of tree growth. The issue, however, centers on the disruption of a structure set upon soil.

Once an expert's qualifications are established, any deficiencies in those qualifications go to the weight to be given an opinion, not its admissibility. *State v. Rangetch*, 34 Wn. App. 274, at 283 (1983). The trial court properly denied the City's motion to strike paragraphs 15 and 16 of Dr. Corp's declaration. At trial, the City may want to question Dr. Corp about the rate of tree growth, the impact freezing weather may have on sidewalks and tree roots, and the duration of the defect based on the foregoing facts. See Respondent's Brief, p.13. But the issue of whether the City had constructive notice is for a jury to decide.

(2) Constructive Notice Based On  
The Duration Of Defect.

Our Supreme Court has ruled that whether a municipality has constructive notice of a defect is a question for the jury, based upon the surrounding facts. *Johnson v. City of Ilwaco*, 38 Wn.2d 408, 229 P.2d 878 (1951). Thus, in the foregoing case, the Court held that the amount of time a sidewalk defect existed constituted one of the facts from which a jury could determine that constructive notice existed:

the jury was justified in drawing an inference that its officers had actual knowledge of their existence and condition; also from the direct and circumstantial evidence, *the jury could conclude that they had existed for a sufficient length of time so that respondent had constructive notice thereof.* The claim filed by appellant set forth that the defect in the sidewalk consisted of a raised section thereof and a broken seam. Inasmuch as the hole is in the seam and a part of it, it was sufficient that the claim refer to the seam as being the defect.

*Johnson, supra*, at 414. [Emphasis added.]

Dr. Corp's expert opinion was not stricken by the trial court, and it established evidence from which jurors could reasonably infer that the sidewalk defect had been present for a sufficient period of time to provide constructive notice of its existence.

(3) Disputed Material Facts Must Be Resolved By The Jury

The Court in *Johnson, supra*, described the matters that are relevant to determining whether a municipality had constructive notice of a sidewalk defect, and held that such questions are for determination by a jury:

The nature and character of the sidewalk, its location, the amount of travel over it by pedestrians, the extent to which its presence would ordinarily be seen or observed by travelers on the sidewalk, and many other conditions which might exist, all have to be taken into consideration. In those cases where reasonable minds can differ, the questions whether an offset in a sidewalk is of such a character that danger to a pedestrian from its existence may reasonably be foreseen and anticipated by the city, and whether in suffering it to remain the city had kept and maintained such sidewalk in a reasonably safe condition for ordinary use by pedestrians, are for the jury to determine. The evidence adduced justified the court in submitting the case to the jury.

*Johnson, supra*, at 413.

In the present case, it is not disputed that a sidewalk defect exists, nor that Mrs. Gennrich tripped over it, nor that she was injured. The trial court ruled that there were not sufficient facts from which a jury could reasonably infer that the City had constructive notice. The facts presented

by Dr. Corp were, however, facts from which reasonable jurors could infer constructive notice existed. First, there was a large tree adjacent to the sidewalk. Second, the tree trunk and root extends up to and underneath the sidewalk, directly adjacent to the sidewalk defect. Third, due to the length of time the tree trunk had been deteriorating, such defect-causing growth had occurred many years before Mrs. Gennrich fell.

C. **CONCLUSION**

The trial court stated only one reason for granting summary judgment, i.e., that there were insufficient facts from which a jury could conclude the City had constructive notice of the sidewalk defect. As demonstrated above, Dr. Corp's testimony established facts from which reasonable jurors could, in fact, conclude that the City had constructive notice of the defect. The trial court erred in dismissing Mrs. Gennrich's lawsuit.

The City's contention that because Dr. Corp is not an arborist, he is not qualified to give an opinion regarding soil and structure disruption is without merit.

Mrs. Gennrich asks that this Court reverse the trial court's dismissal, reject the City's argument regarding Dr. Corp's qualifications,

and remand the case for trial.

DATED this 19<sup>th</sup> day of October, 2010.

Respectfully submitted,

A handwritten signature in black ink that reads "John A. Bardelli". The signature is written in a cursive style with a horizontal line underneath it.

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**DECLARATION OF SERVICE**

John A. Bardelli declares, under penalty of perjury, that he personally served this Appellant's Reply Brief on the City Attorney for the City of Spokane, on October 19, 2010.

DATED this 19<sup>th</sup> day of October, 2010.

A handwritten signature in black ink that reads "John A. Bardelli". The signature is written in a cursive style with a horizontal line underneath the name.

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