NO. 286410

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

FILED
MAY 13 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

RHONDA JO GENNRICH,

Appellant,

vs.

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

Respondents.

BRIEF OF APPELLANT

JOHN A. BARDELLI
Attorney for Appellants
606 N. Pines Road, Suite 201
Spokane, WA 99206
(509) 926-9566

NO. 286410

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

FILED
MAY 13 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

RHONDA JO GENNRICH,

Appellant,

vs.

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

Respondents.

BRIEF OF APPELLANT

JOHN A. BARDELLI
Attorney for Appellants
606 N. Pines Road, Suite 201
Spokane, WA 99206
(509) 926-9566

TABLE OF CONTENTS

I. INTRODUCTION 1

1. Detailed Facts to be Construed Favorably to Plaintiff as Non-Moving Party 1

II. ASSIGNMENTS OF ERROR 24

1. THE COURT ERRED IN RULING THAT, AS A MATTER OF LAW, NO REASONABLE JURY COULD HAVE CONCLUDED THAT THE CITY OF SPOKANE WAS NEGLIGENT IN THE MAINTENANCE OF CITY SIDEWALKS . . . 24, 25

2. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION 25

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR . 25

IV. STATEMENT OF THE CASE 25

1. PROCEEDINGS BELOW 25

2. RELIEF SOUGHT 25

V. LEGAL ANALYSIS 26

A. ISSUES AND GENERAL DISCUSSION OF NOTICE REQUIREMENT 26

1. WHERE GENUINE MATERIAL ISSUES OF FACT EXIST, IS A MOVING PARTY ENTITLED TO SUMMARY JUDGMENT? 26

2. TO THE EXTENT THAT A MUNICIPALITY IS REQUIRED TO BE PUT ON NOTICE OF A SIDEWALK DEFECT, WHAT CONSTITUTES NOTICE? 26

3. DO GENUINE ISSUES OF MATERIAL FACTS EXIST AS TO WHETHER THE CITY OF SPOKANE BREACHED ITS DUTY TO

RENDER THE SIDEWALK SAFE FOR SIDEWALK USERS? 26

4. DOES A GENUINE MATERIAL ISSUE OF FACT EXIST AS TO WHETHER THE CITY OF SPOKANE'S BREACH OF ITS DUTY TO MAKE THE SIDEWALK SAFE FOR SIDEWALK USERS WAS A PROXIMATE CAUSE OF INJURIES RHONDA J. GENNRICH SUSTAINED WHEN SHE FELL WHILE TRIPPING ON A PROTRUDING LIP WITHIN THE SIDEWALK? 26

B. SUMMARY JUDGMENT STANDARDS 26

1. WHERE GENUINE MATERIAL ISSUES OF FACT EXIST, A MOVING PARTY IS NOT ENTITLED TO SUMMARY JUDGMENT 26

C. IS A MUNICIPALITY ENTITLED TO NOTICE OF A SIDEWALK DEFECT BEFORE IT CAN BE HELD RESPONSIBLE FOR INJURIES SUSTAINED BY A PEDESTRIAN RESULTING FROM AN ENCOUNTER WITH THE DEFECT WHILE USING THE SIDEWALK? 28

1. GENERAL DISCUSSION OF NOTICE REQUIREMENT 28

D. SPECIFIC WASHINGTON CASES DEALING WITH WHAT CONSTITUTES NOTICE ISSUE 35

E. LENGTH OF TIME OF DEFECT EXISTENCE CONSTITUTING CONSTRUCTIVE NOTICE . . 44

3. WHETHER THE CITY OF SPOKANE BREACHED ITS DUTY TO RHONDA JO GENNRICH TO MAINTAIN THE SIDEWALK SAFE FOR PEDESTRIAN USAGE IS QUESTION OF FACT TO BE DETERMINED BY A JURY 50

A. DUTY OF MUNICIPALITY TO MAINTAIN

AND ESTABLISH SIDEWALKS 50

1. Statutory: R.C.W. 35.22.280 Specific Powers Enumerated 50

2. Nondelegable Nature of the Duty 52

3. Notice: Constructive or Actual 53

4. A GENUINE ISSUE OF FACT EXISTS AS TO WHETHER THE CITY OF SPOKANE BREACHED ITS DUTY OF CARE TO MAINTAIN A CITY SIDEWALK IN A SAFE CONDITION WHICH WOULD HAVE PREVENTED PLAINTIFF RHONDA GENNRICH FROM BEING INJURED AS A RESULT OF AN EXISTING DEFECT OF WHICH DEFENDANT CITY OF SPOKANE HAD EXPRESS OR CONSTRUCTIVE NOTICE 53

VI. CONCLUSION 54

TABLE OF AUTHORITIES

Argus v. Peter Kiewit Sons' Co., 49 Wn.2d 853, 307 P.2d 261 (1957) 44

Balise v. Underwood, 62 Wn.2d 195, 199-200, 381 P.2d 966 (1963) 27, 28

Barrie v. Hosts of America, 94 Wn.2d 640, 642, 618 P.2d 96 (1980) 28

Bernal v. American Honda Motor Co., 87 Wn.2d 406, 416, 553 P.2d 107 (1970) 29

Blasick v. Yakima, 45 Wn.2d 309, 274 P.2d 122 (1954) 37, 44

Bond v. State, 62 Wn.2d 487, 491, 383 P.2d 288 (1963) 28

Carlyle v. Safeway Stores, 78 Wash.App. 272, 274-75, (1995) 27

City of Seattle v. Shorrock, 100 Wash. 234, 245, 170 Pac, 590 (1918) 54

Clevenger v. Seattle (1947), 29 Wn. (2d) 167, 186 P. (2d) 87) 37, 49

Davis v. Niagara Machine Co., 90 Wn.2d 342, 348, 581 P.2d 1344 (1978) 28

Duckworth v. Bonney Lake, 91 Wn.2d 19, 21, 586 P.2d 860 (1978) 29

Frescoln v. Puget Sound Traction, Light and Power Company, 90 Wash. 59, 155 Pac. 395 42

Fritsche v. Seattle, 10 Wn. (2d) 357, 116 P. (2d) 562 41

Gallamore v. City of Olympia, 34 Wash. 379, 75 P. 978 (1904) 29, 48

Gosse v. Swedish Hosp., 4 Wash.App. 574, 576, 483 P.2d 147 (1971) 28

Grass v. City of Seattle, 100 Wash. 542, 171 P. 533 (1918) . . 38, 39, 43, 44

Grimsrud v. State, 63 Wn.App. 546, 549, 821 P.2d 513 (1991) 54

Hash v. Children's Orthopedic Hospital, 110 Wn.2d 912, 757 P.2d 507 (1990) 27

Hines v. Cheshire, 36 Wn.(2d) 467, 219 P. (2d) 100 39

Hines v. Neuner, 42 Wn. (2d) 116, 253 P. (2d) 945 (1953) 37, 49

James v. Burchett, 15 Wn. (2d) 119, 129 P. (2d) 790 (1942) 37, 49

Johnson v. City of Ilwaco, 38 Wn.2d 408, 229 P.2d 878 (1951) 37, 44, 45, 49, 50

Keller v. City of Spokane, 104 Wn.App. 545, 553, 17 P.3d 661 (2001) 54

Kennedy v. City of Everett, 2 Wn.2d 650, 653, 99 P.2d 614, amended, 4 Wn.2d 729, 103 P.2d 371 (1940) 37, 41, 48, 54

Klinke v. Famous Recipe Fried Chicken, 94 Wn.2d 255, 257, 616 P.2d 644 (1980) 27

Lewis v. Spokane, 124 Wash. 684, 215 Pac. 36 41

Ohler v. Tacoma General Hosp., 92 Wn.2d 507, 598 P.2d 1358 (1979) 28

Omeitt v. Department of Labor & Industries, 21 Wn. (2d) 684, 152 P. (2d) 973 39

Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960) 28

Ray v. Salt Lake City, 92 Utah 412, 69 P. (2d) 256, 119 A. L. R. 153 40

Rivett v. City of Tacoma, 123 Wn.2d at 582, 870 P.2d 299 (1994) 54

Schneider v. Yakima County, 65 Wn.2d 352 (1964) 54

Severns Motor Co. v. Hamilton, 35 Wn.(2d) 602, 214 P. (2d) 516 39

Skaggs v. General Elec. Co., 52 Wn.2d 787, 328 P.2d 871 (1958) 37, 50

Smith v. City of Aberdeen, 7 Wn. App. 664, 502 P.2d 1034 (1972) 42, 49

South Side Tabernacle v. Church of God, 32 Wash. App. 814, 821, 650 P.2d 231 (1982) 27

Stone v. City of Seattle, 64 Wn.2d 166, 391 P.2d 179, (1964) 36, 37, 50, 54

Sullivan v. Butte, 104 Mont. 225, 65 P. (2d) 1175 40

CIVIL RULES

CR 56(c) 27

REVISED CODE OF WASHINGTON

RCW 35.22.280(7) 50

LEGAL TREATISES

Restatement (Second) of Torts § 418 (1965) 52

McQuillin The Law of Municipal Corporations, **Chapter 54, Municipal Liability for Defective Streets, (VIII. Notice of Defects and Obstructions)** 29

I. INTRODUCTION

1. Detailed Facts to be Construed Favorably to Plaintiff as Non-Moving Party.

The material and genuine facts in this case, which a trial court hearing a CR 56 Summary Judgment Motion, is mandated by force of law to construe favorably to the non-moving party, the Plaintiff, include the following, all which serve as introductory facts of the case:

1. On July 1, 2003, Plaintiff Rhonda Jo Gennrich, aged 78 at the time of the injurious event was walking on a sidewalk adjacent to real property located at W. 804 Dalton within the City of Spokane, State of Washington. CP 4, Paragraph 7; CP 50, Page 50, Line(s) 23-25, Page 51, Line(s) 1-25.

2. Defendants Jean Combs and Frances Heckman were the reputed owners of the real property located at W. 804 Dalton, City of Spokane, and the City of Spokane sidewalk in question lay to the east of the property. CP 4, Paragraphs 3 and 8; CP 71, Page 59, Line(s) 4 - 24,; Page 60, Line(s) 1 - 11.

3. Unbeknownst to Plaintiff Rhonda Jo Gennrich, as she walked on the sidewalk, a lip protruded between adjacent sections of the sidewalk, creating a hazardous condition and rendering the sidewalk unsafe for foreseeable usage of the sidewalk while in that hazardous condition. CP 5, Paragraph 9; CP 101, Paragraph 7.

> On July 1, 2003, Rhonda Jo Gennrich was walking on a sidewalk adjacent to real property located at W. 804 Dalton within the City of Spokane, State of Washington.

* * *

> A "lip" protruded in the joint between adjacent sections of the sidewalk on which Rhonda Jo Gennrich was traversing adjacent to the Combs-Heckman home.

4. A "lip" protruded in the joint between adjacent sections of the sidewalk on which Rhonda Jo Gennrich was traversing adjacent to the Combs-Heckman home. CP 101, Paragraph 7.

5. The "lip" or offsets, as measured across the sidewalk by Dr. Corp, were zero inches at the edges, 1.375" at the center, and 1.0" at one-quarter points. CP 101, Paragraph 7(d).

> The "lip" or offsets were measured across the sidewalk by myself. They were zero inches at the edges, 1.375" at the center, and 1.0" at one-quarter points.

6. Dr. Corp took photographs which captured the hazardous condition present within the sidewalk which revealed the location of the tree trunk on the adjoining property, captured as Exhibits 1 - 15 in Dr. Corp's Declaration. CP 101, Paragraph 7(e) and CP 111-138.

> I took photographs to show the hazardous condition of the sidewalk and tree trunk on the adjoining property and those photographs are attached, hereto, as Exhibits 1 - 15. [CP 111-138]

7. As Rhonda Jo Gennrich walked on the sidewalk, the sole of her shoe, beneath the right toe of the shoe, caught the "lip" forcing her to lose her balance whereupon she fell face forward directly onto the concrete sidewalk. CP 101, Paragraph 7(f).

> As Rhonda Jo Gennrich walked on the sidewalk, the sole of her shoe, beneath the right toe of the shoe, caught the "lip"

> forcing her to lose her balance whereupon she fell face forward directly onto the concrete sidewalk.

8. Rhonda Jo Gennrich struck her face, head and anterior portions of her body upon striking the cement sidewalk and she was rendered unconscious as a result of the fall. CP 101, Paragraph 7(g).

> Rhonda Jo Gennrich struck her face, head and anterior portions of her body upon striking the cement sidewalk and she was rendered unconscious as a result of the fall.

9. Rhonda Jo Gennrich sustained serious and permanent injuries as a consequence of the fall. CP 64, Page 30, Line(s) 2-25, Page 31, Line(s) 1-25, Page 32, Line(s) 1-25; CP 101, Paragraph 7(h).

> Rhonda Jo Gennrich sustained serious and permanent injuries as a consequence of the fall.

10. As Plaintiff Rhonda Jo Gennrich walked on the sidewalk, her toe on her right shoe caught the lip forcing her to lose her balance whereupon she fell face forward directly onto the concrete sidewalk forcefully striking her head and face, the force of the blow rendered her unconscious. CP 5, Paragraph 10; CP 66, Page 39, Line(s) 16-25; Page 40, Lines 1-25; Page 41, Line(s) 1-25; CP 67, Page 42, Lines 1-15.

> Q. [Bardelli] I'm going to hand you a pen, red pen, and I'm going to have you mark on Exhibit 1. And we'll probably have to make more photos of this, but let's go to page 2 of Exhibit 1. From your conversation with Ms. Gennrich, what portion of that lip caught her shoe causing her to fall?
>
> A. [Paradis] I'll have to refer to her statement.
>
> Q. Now, what statement are you referring to here?

A. Summary, it's a handwritten summary of her taped statement.

* * *

A. Uh-huh. Want me to mark it?

Q. Sure.

A. (Witness complied). Approximate.

Q. Okay. You've drawn a red arrow on Exhibit 1, page 2, of the top uppermost photo, a little bit to the left of center?

A. Uh-huh.

Q. Correct? And what is your understanding, was it her right foot or her left foot that caught?

A. She told me her right foot.

Q. All right. And did she eventually show you the shoes that she was wearing?

A. Yes.

Q. And did you examine the shoes?

A. Cursory exam.

Q. Is there anything about the shoes that you believe was contributory to having -- well, is it your understanding that her left toe of that shoe caught that lip?

A. She told me it was her right foot, her big toe, yeah.

Q. Did I mis-speak?

MR. COX: You said left, left toe.

Q. Okay. And so your -- so it's her right foot?

A. Uh-huh.

Q. I'm sorry. Her right foot. And my question is: Is there anything that was contributory to the shoe, based on your examination, that caused

this, caused her to fall?

MR. COX: Object to the form, but you can answer.

A. I don't think so.

Q. Okay. Is the lip such that any shoe with a sole could catch that during the course of walking --

MR. COX: Same objection, but you can answer.

Q. -- based on your exam.

A. Yeah. Yes.

Q. Okay. Did that, your examination of the sidewalk in question, lead you to believe that that lip had been raised up, that the difference between -- which direction are we looking here, Dennis?

A. South.

Q. You're looking to the south. So this would be the southernmost portion of the walk and this would be the northernmost portion of the section? I'm referring to page 2 of Exhibit 1, top picture.

A. Correct...

11. Plaintiff Rhonda Jo Gennrich, while walking at a normal, leisurely pace upon the sidewalk, did not see the sidewalk lip on which she tripped, caught her toe on the lip causing her to trip. Upon tripping she landed face down, striking her face, head and anterior portions of her body upon striking the cement sidewalk upon falling and breaking her nose, shattering her glasses, and was rendered unconscious as a result of the fall. CP 5, Paragraph 11; CP 69, Page 50, Line(s) 13-25; Page 51, Line(s) 1-25; Page 52, Line(s) 1-25; Page 53, Line(s) 1-22.

Q. [Bardelli] On the very last page of Exhibit 4, there's a photo of a lady. Could you identify who that lady is?

A. [Paradis] Yeah. That would be Rhonda Gennrich.

Q. And did you take the photo?

A. Yes.

Q. Where was the photo taken, if you know?

A. At her house.

Q. That's inside her home?

A. Yeah. Where she lived, anyway.

Q. Tell me what -- a synopsis of what she told you happened, as you recall. I'm going to ask you some questions about that. Did she indicate to you that she was out for a walk on the sidewalk?

A. Yeah. She was going to catch the bus.

Q. Catch the bus?

A. Uh-huh.

Q. Okay. And did she tell you where the bus stopped?

A. On -- yeah. I think she said it was on Monroe Street. Let me look. Three blocks from her house.

Q. And this occurred on July 1st of 2003, correct, the tripping?

A. Yeah.

Q. Over the lip?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. And did she tell you that she was walking leisurely or did she tell you that she was in a hurry, or either?

A. Neither one.

Q. Did you gather anything about the speed of her walk in your conversations with her?

A. Not from the conversation.

Q. Did you ever make a determination as to the speed of her walk?

A. Seemed to be a normal -- normal pace.

Q. And did she tell you that as she was walking she didn't see the lip?

A. Yes.

Q. Yes, she didn't see it?

A. Yes, she didn't see it.

Q. And did she advise you that her right -- the right toe portion of her shoe caught the lip?

A. Hooked on something, she said.

Q. Pardon?

A. She said her right toe hooked on something.

Q. And did you -- did you reach a conclusion that it is the lip that her shoe caught on?

A. Yeah. She showed me the lip. We walked down there together.

Q. Okay. And did it pitch her forward from her momentum onto the sidewalk?

A. She told me, quote, I went completely flat.

Q. Okay. Does that mean on her face?

A. I think so. She said her nose was broken and pushed to the left and her glasses were damaged.

Q. Did she indicate to you that she was knocked unconscious?

A. She said she was.

Q. Did she have any idea how long she laid on the sidewalk?

A. She told me ten to 15 minutes.

Q. Did she indicate to you that no one came to assist her?

A. I remember her telling me that, yes.

Q. And did she tell you that she was spread out on the sidewalk face down with her arms out?

A. I don't recall that part.

Q. Do you recall how she was laying on the sidewalk? Let me ask you this: Was she face down on the sidewalk?

A. Face down when she landed.

Q. All right. Did she recall anybody helping her, assisting her?

A. She told me she crawled home and collapsed when she got on her steps.

Q. How far was home from the point of the fall?

A. About a half of a block, half a city block.

Q. Is that consistent, that statement, consistent with your examination, Mr. Paradis, of the emergency response records from your having examined them?

A. I'll have to look at them again.

12. Thereafter, Plaintiff Rhonda Jo Gennrich sought necessary medical care and treatment for the injuries sustained as a consequence of being injured when she fell. CP 5, Paragraph 13; CP 70, Page 57, Line(s) 19-24.

Q. [Bardelli] Okay. In any event, was she taken to the hospital? If you look at the very last page, I think it will tell you.

A. [Paradis] Okay. Yeah.

Q. And to your knowledge, what hospital was that?

A. Sacred Heart Medical Center.

13. On or about June 7, 2004, Plaintiff Rhonda Jo Gennrich filed a Notice of Claim in writing with the Spokane City Clerk. CP 5, Paragraph 14; CP 59, Page 12, Line(s) 19-25; Page 13, Line(s) 1, 2.

14. On or about July 24, 2004, Defendant City of Spokane, acting through an authorized and ostensible adjuster for Defendant City of Spokane, Dennis Paradis, declined Plaintiff's Claim for Damages. CP 5, Paragraph 15; CP 63, Page 26, Line(s) 3-25; Page 27, Line(s) 1-5.

Q. [Bardelli] Did you have a discussion with anybody about -- well, strike that. In reading your affidavit filed in this particular case, it says that you have over 40 years' experience in investigation and adjustment of personal injury claims.

A. [Paradis] Right.

Q. Does that adjustment mean that when claims are made that you attempt to adjust the claim, settle it, in essence?

A. Settle it if it's warranted to settle it, yes.

Q. Okay. If it's not warranted to settlement, to either advise the claimant that it's not a worthy claim or advise whoever hired you that it's not a worthy claim; correct?

A. Right.

Q. And in this particular case, did you ever advise Ms. Gennrich that her claim was not worthy?

A. Yes.

Q. And when did you advise her of that.

A. July 24th, 2004, I sent her a letter.

Q. What's the date again? July what?

A. 24th. Also on 7/1/04 I told her essentially the same thing.

Q. What did you tell her specifically on July 1st?

A. That we felt it was the responsibility of the adjoining landowner to maintain the sidewalk.

15. The City of Spokane does not take a proactive role in going out looking at sidewalks in general to inspect the sidewalks for defects nor does it have a maintenance program in place and has not had such any inspection protocol in force for at least 22 years. CP 40, Page 5, Line(s) 10-25; CP 41, Page 6, Line(s) 1-11; Page 6, Lines 21-25; Page 7, Lines 1-10.

Q. [Bardelli] All right. What is your function relative to sidewalk usage related to your employment in the City of Spokane?

A. [Eaton] Related to sidewalk dealings, in my capacity as permit coordinator with the City of Spokane engineering services, I am a front line person that receives complaints about conditions of sidewalks, and the complaints are forwarded to me if they're not given to me directly, forwarded to me, and then my office deals with follow-up on those complaints.

Q. Where do the complaints arise?

A. They can come from interdepartmental, they can come from citizens, and then cases like this.

Q. So essentially two sources --

A. Essentially, yes.

Q. -- interdepartmental being through the mechanism that the City of Spokane has set in force to inspect and determine whether or not there's a defective condition, they can report it; am I correct?

A. Well, the City doesn't really take a proactive role in going out looking at sidewalks in general. Somehow through various means, usually citizen contact, the City is reported that there's a fault somewhere and then that will result in a follow-up. And then if, say, if the street department gets called by some citizen, then the street department will contact me and refer that to me.

16. The City of Spokane has no written protocol or procedure designed to facilitated the inspection of sidewalks for defects to remedy the defects before sidewalk users get hurt. CP 44, Page 21, Line(s) 6 - 18.

Q. [Bardelli] Is there any written protocol that you're aware of that is utilized by the City of Spokane to conduct an inspection of sidewalks for defects so that those defects can be remedied before people are hurt?

A. [Eaton] Written protocol, you mean --

Q. A procedure?

A. Procedure. No, there is not.

Q. And we're talking about now you're saying that's the case. Has there been enforced any such process since you're being employed by the department where you now work, which was from 19 -- from 2003 forward? Has there been any written procedure?

A. No, sir.

Q. So in terms of maintenance of the sidewalks and remedying the effects, you rely upon a notice system that's essentially provided to you by sidewalk users?

A. Yes.

17. Defendant City of Spokane relies exclusively on notice being provided to it concerning sidewalk defects before repairs are undertaken. CP, 44, Page 21, Line(s) 19-22.

Q. [Bardelli] So in terms of maintenance of the sidewalks and

remedying the defects, you rely upon a notice system that's essentially provided to you by sidewalk users?

A. [Eaton] Yes.

18. At all times material to this lawsuit, even when Defendant City of Spokane became aware of a defect in a sidewalk, when the defect was caused by an adjoining property owner, if the adjoining property owner refused to correct the defect, the City of Spokane had and still has no system in effect to repair the defect. CP 45, Page 22, Line(s) 18-25; Page 23, Line(s) 1-25, Page 24, Lines 1-13.

Q. [Bardelli] So when there is a defect and the City is going to be -- let's strike that. Let's assume that there's a defect that the City recognizes is caused by an adjoining property owner to the sidewalk and you deem it to be that person's responsibility to correct the defect. Correct? I'm giving you a hypothetical. You've got an adjoining home, household owner to the sidewalk where a defect exists, and the City deems that the sidewalk defect has been caused by the maintenance or the failure to maintain the property in a condition and that condition allows the sidewalk to become defective. And then you send out a letter to the property owner; correct?

A. [Eaton] Correct.

Q. Is that the procedure?

A. That is the procedure, yes.

Q. And you advise them to remedy the defect?

A. Yes.

Q. And if they fail to remedy the defect or they say "It's not our responsibility," what goes in motion at that juncture?

A. At this point in time we do not have a contractor on contract to go out and remedy those situations. There is a program that we're trying to have to fund that program where I can have a contractor go fix the problems and then the property owner will have a chance to pay that back over a period of time. That program is not in place.

Q. That be like a writ assessment?

A. I'm not sure what that is.

Q. A road improvement development?

A. It would be an assessment on the property.

Q. Sure.

A. A lien, if you will.

Q. But it's nothing -- it's not in force and effect; correct?

A. That is correct.

Q. And so you can't, the City can't just engage a contractor to go out and remedy the defect, is what you're telling me?

A. That is correct, yes.

Q. Has that been the same since your involvement with the engineering department since 2003 forward?

19. It takes a formal complaint to be filed to initiate the complaint process, the setting up a file, and then the issuing of a permit to commence the process to effectuate a repair to a sidewalk defect because the City of Spokane does not take a proactive role in inspecting sidewalks to see if defective conditions exist. CP 40, Page 5, Line(s) 10-25; CP 41, Page 6, Line(s) 1-25.

Q. [Bardelli] All right. What is your function relative to sidewalk usage related to your employment in the City of Spokane?

A. [Eaton] Related to sidewalk dealings, in my capacity as permit coordinator with the City of Spokane engineering services, I am a front line person that receives complaints about conditions of sidewalks, and the complaints are forwarded to me if they're not given to me directly, forwarded to me, and then my office deals with follow-up on those complaints.

Q. Where do the complaints arise?

A. They can come from interdepartmental, they can come from citizens, and then cases like this.

Q. So essentially two sources --

A. Essentially, yes.

Q. -- interdepartmental being through the mechanism that the City of Spokane has set in force to inspect and determine whether or not there's a defective condition, they can report it; am I correct?

A. Well, the City doesn't really take a proactive role in going out looking at sidewalks in general. Somehow through various means, usually citizen contact, the City is reported that there's a fault somewhere and then that will result in a follow-up. And then if, say, if the street department gets called by some citizen, then the street department will contact me and refer that to me.

20. The issuing of a permit is then designed to allow someone to tear up a condition to remedy a defect and a contractor is then utilized. CP 41, Page 9, Line(s) 5-13.

Q. [Bardelli] And so it takes a formal complaint to be filed to initiate the complaint process, the setting up a file, and then the issuing of a permit?

A. [Eaton] That is correct.

Q. And the issuing of a permit is designed to allow someone to tear up a condition to remedy a defect?

A. That is correct.

Q. Fair?

A. Contractor, yes.

21. Daniel H. Eaton has examined the sidewalk where Plaintiff Rhonda J. Gennrich fell and injured herself and agrees that it might constitute a tripping

condition.[18]

The purpose of this rule is to protect the traveling public from any unsafe or dangerous conditions on the streets and sidewalks.[19]

The government's non-delegable duty to maintain the public roadways is defined in Restatement (Second) of Torts § 418 (1965) as follows:

> (1) One who is under a duty to construct or maintain a highway in reasonably safe condition for the use of the public, and who entrusts its construction, maintenance, or repair to an independent contractor, is subject to the same liability for physical harm to persons using the highway while it is held open for travel during such work, caused by the negligent failure of the contractor to make it reasonably safe for travel, as though the employer had retained the work in his own hands.
>
> (2) The statement in Subsection (1) applies to any place which is maintained by a government for the use of the public, if the government is under the same duty to maintain it in reasonably safe condition as it owes to the public in respect to the condition of its highways.

---

[18] Singleton v. City of Jacksonville, 107 So. 2d 47 (Fla. Dist. Ct. App. 1958); City of Gary v. Bontrager Const. Co., 113 Ind. App. 151,47 N.E.2d 182 (1943); Leonard v. Mel Foster Co., Inc., 244 Iowa 1319, 60 N.W.2d 532 (1953); Riley v. Woolf Bros., 236 Mo. App. 661, 159 S.W.2d 324 (1942); Bechefsky v. City of Newark, 59 N.J. Super. 487. 158 A.2d 214 (1960); Rupp v. New York City Transit Authority. 15 A.D.2d 800, 224 N.Y.S.2d 1007 (1962).

[19] Lopes v. Rostad, 45 N.Y.2d 617, 412 N.Y.S.2d 127. 384 N.E.2d 673 (1978). The county defendant successfully argued that the legislative policy underlying the nondelegable duty statute was to protect the traveling public. Since the injured parties in this case were employees of an independent contractor, who were injured through the negligence of their employer when they were struck by a passing automobile while working in the roadway, the county owed them no duty. The court would have imposed liability, however. if the independent contractor's negligence had caused injury to a traveler. 30 Restatement (Second) of Torts § 418 (1965).

Moreover, this duty exists even though the dangerous condition causing injury or loss is created by an another.[20]

3. Notice: Constructive or Actual

Cities also are liable for defective conditions within streets or sidewalks of which they have constructive or actual notice. Rivett v. City of Tacoma, 123 Wn.2d at 582, 870 P.2d 299 (1994); Stone v. City of Seattle, 64 Wn.2d 166, 170-171, 391 P.2d 179 (1964); Kennedy v. City of Everett, 2 Wn.2d 650, 653, 99 P.2d 614, amended, 4 Wn.2d 729, 103 P.2d 371 (1940); City of Seattle v. Shorrock, 100 Wash. 234, 245, 170 Pac, 590 (1918).

4. A GENUINE ISSUE OF FACT EXISTS AS TO WHETHER THE CITY OF SPOKANE BREACHED ITS DUTY OF CARE TO MAINTAIN A CITY SIDEWALK IN A SAFE CONDITION WHICH WOULD HAVE PREVENTED PLAINTIFF RHONDA GENNRICH FROM BEING INJURED AS A RESULT OF AN EXISTING DEFECT OF WHICH DEFENDANT CITY OF SPOKANE HAD EXPRESS OR CONSTRUCTIVE NOTICE

Actionable negligence occurs when a party breaches a duty owed to another. Grimsrud v. State, 63 Wn.App. 546, 549, 821 P.2d 513 (1991).

> ***Once primary duty is established as a matter of law, the remaining elements - breach, proximate cause, and damages - are the factual questions for the jury. It is in the factual context of proximate cause that we ask whether, in the particular circumstances, the defendant's liability - or duty - extended to protect a particular plaintiff from the actual events. This aspect of duty is always determined by the finder of fact.***

---

[20] Westby v. Itasca County, 290 N.W.2d 437 (Minn. 1980); Lopes v. Rostad, 45 N.Y.2d 617, 412 NY.S.2d 127,384 N.E.2d 673 (1978).

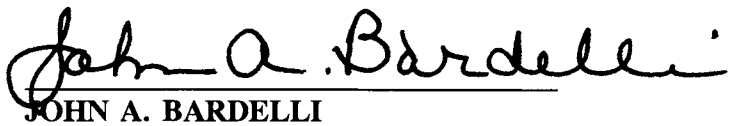
Keller v. City of Spokane, 104 Wn.App. 545, 553, 17 P.3d 661 (2001). *See also* Schneider v. Yakima County, 65 Wn.2d 352 (1964).

Due to the existence of facts in controversy and facts which are subject to reasonable conflicting inferences regarding the entitled notice given Defendant City of Spokane of the defect and hazardous condition in the subject sidewalk where the Plaintiff tripped and fell, the proximate cause of Rhonda Gennrich's injuries, and the abdication of Defendant City of Spokane's lawfully imposed duty to provide a sidewalk which could be safely traversed, the granting of summary judgment is unlawful and the trial court should be reversed.

VI. CONCLUSION

For all of the above stated reasons, Defendant City of Spokane's Motion for Summary Judgment should not have been granted and should be reversed on this appeal.

DATED this 13TH day of May, 2010.



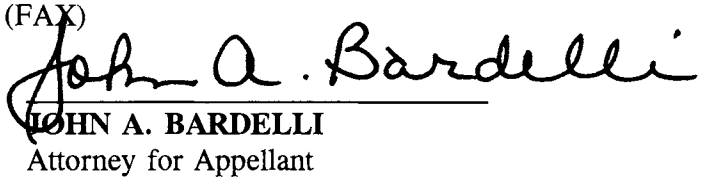
JOHN A. BARDELLI
Attorney for Appellant
WSBA No. 05498

CERTIFICATE OF SERVICE

I hereby certify that on the **13th** day of May, 2010 pursuant to RAP 5.4(b), I caused to be served a true and correct copy of the BRIEF OF APPELLANT, via direct delivery, to the following:

Salvatore J. Faggiano; and
Bruce E. Cox
Assistant City Attorney
Office of the City Attorney
5th Floor Municipal Building
Spokane, WA 99201

__ U.S. MAIL
X HAND DELIVERED VIA MESSENGER
__ TELECOPY (FAX)



JOHN A. BARDELLI
Attorney for Appellant
WSBA NO. 054987