

FILED
JUL 26 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 286410

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RHONDA JO GENNRICH,

Appellant and Cross-Respondent

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,

Respondent and Cross-Appellant.

BRIEF OF RESPONDENT AND CROSS-APPELLANT
CITY OF SPOKANE

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I. INTRODUCTION.

This is a personal injury case arising out of an accident occurring on or about July 1, 2003. Appellant, Rhonda Jo Gennrich, while walking in her neighborhood allegedly tripped and fell over a small rise in a public sidewalk and injured herself. The City filed a Motion to Dismiss and alternatively sought Summary Judgment in the matter.

The trial court ruled that, based upon the evidence properly before the court, there were no material issues of fact, and as a matter of law the City was entitled to dismissal. Appellant is appealing the trial court's dismissal of the City of Spokane from the lawsuit and the subsequent denial of Appellant's Motion for partial Reconsideration.

In addition, the City has filed a cross review pursuant to RAP 5.2(f) for the purpose of clarifying and/or correcting the lower court's record as related to the City's motion to strike certain paragraphs contained in the Declaration of Ernest L. Corp, which was filed by the Appellant in support of her Response to the City's Motion to Dismiss.

II. ASSIGNMENT OF ERROR.

A. RESTATEMENT OF ISSUES PRESENTED BY THE APPELLANT'S APPEAL.

1. The trial court erred in granting the respondent, City of Spokane's (hereinafter "the City") motion for summary judgment.

2. The trial court erred in denying appellant's motion for partial reconsideration.

B. ASSIGNMENTS OF ERROR ON CROSS REVIEW.

The trial court erred by denying the City's motion to strike portions of opinion testimony of Ernest L. Corp contained in his declaration, filed in support of Appellant's Response to the City's Motion to Dismiss, or in the Alternative, Summary Judgment.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS.

1. Did the trial court err in granting the City's Motion for Summary Judgment after finding there was no material issue of fact, and as a matter of law, the City was entitled to judgment?

2. Did the trial court err in denying the Appellant's motion for reconsideration?

D. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS ON CROSS REVIEW.

Did the trial court err in denying the City's motion to strike portions of the opinion testimony of Ernest L. Corp, to wit: paragraphs 15 and 16 of his declaration, in support of Appellant's response to the City's Motion for Dismissal, or in the Alternative Summary Judgment?

III. STATEMENT OF THE CASE.

On July 1, 2003, the Appellant, Rhonda Jo Gennrich, was walking on a sidewalk adjacent to property located at 804 W. Dalton in Spokane. CP 4 (Complaint, ¶ 7). Appellant allegedly tripped on a protruding portion of sidewalk and fell. CP 5 (Complaint, ¶ 10). Appellant contends she sustained bodily injuries as a result of the fall. CP 5 (Complaint, ¶ 10-12). Respondent, City of Spokane, had no actual notice of the allegedly defective sidewalk. CP 263-264 (Affidavit of Daniel H. Eaton, ¶ 9 and ¶ 10); CP 265-267 (Affidavit of Samuel McKee).

IV. ARGUMENT.

A. THE TRIAL COURT DID NOT ERR BY GRANTING THE CITY'S MOTION FOR SUMMARY JUDGMENT OR BY DENYING APPELLANT'S MOTION FOR PARTIAL RECONSIDERATION.

In this appeal, the Appellant is appealing the trial court's order of summary judgment, dismissing the case against the City, as well as the trial court's affirming the same on reconsideration.

1. Standard of Review on Appeal.

In reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *McMann v. Benton County*, 88 Wn. App. 737, 740, 946 P.2d 1183, 1185 (1997), *review denied* 135 Wn.2d 1005, 959 P.2d 125 (1998). "Summary judgment is proper ... when the pleadings, depositions, and admissions in the record, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* "All facts and reasonable inferences are considered most favorably to the nonmoving party." *Id.* "The moving party must meet this burden by setting out its version of the facts and alleging

there is no genuine issue as to the facts offered.” *Id.* “While generally a question of fact is properly left to the trier of fact, when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” *Id.* “Once there has been an initial showing of the absence of any genuine issue of material fact, the party opposing summary judgment must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues.” *Id.*

2. The City’s Duty is Limited to Fixing Conditions of Which it has Notice.

The City was entitled to summary judgment because no municipality is an insurer or guarantor of the safety of its streets. *Prybysz v. Spokane*, 24 Wn. App. 452, 458-59, 601 P.2d 1297 (1979); *accord, Ruff v. County of King*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995). For a city to be liable, it must have: (a) notice of a dangerous condition which it did not create, and (b) a reasonable opportunity to correct the dangerous condition before liability arises. *Nibarger v. City of Seattle*, 53 Wn.2d 228, 229, 332 P.2d 463, 463 (1958).

In the case of uneven sidewalks and similar defects, the City's liability to the users of its streets is predicated upon its having notice, either actual or constructive, of the uneven sidewalk. *Albin v. National Bk. of Commerce*, 60 Wn.2d 745, 375 P.2d 487 (1962).

Liability in such cases, and those of like import, arises out of negligence in failure to keep the instrumentalities in a proper state of repair. If the defects do not occur by reason of active negligence upon the part of the city, the duty to repair cannot arise until the city has actual or constructive notice of the defects. The city becomes negligent when, after such notice, it fails to make the necessary repairs.

Russell v. Grandview, 39 Wn.2d 551, 554, 236 P.2d 1061 (1951).

As spelled out in Washington Pattern Jury Instructions ("WPI") 140.01 and a long line of Washington cases, the City's duty is defined as: "a duty to exercise ordinary care in the *[design] [construction] [maintenance] [repair]* of its public *[roads] [streets] [sidewalks]* to keep them in a reasonably safe condition for ordinary travel." WPI 140.01, and the cases cited therein. Sound policy judgment supports the foregoing principle.

3. There is No Evidence the City Had Notice of the Uneven Sidewalk in This Case.

In this case, the foregoing principles required summary judgment dismissing the City from this lawsuit.

The undisputable pivotal facts are as follows:

a) There is no evidence the City caused the alleged defect;

b) There is no evidence that the City had notice of it at any time prior to July 1, 2003. Specifically, the City received no prior complaints with respect to an alleged defect in the condition of the sidewalk in question. CP 261-267 (Affidavit of Daniel H. Eaton and Samuel McKee);

c) The City had not issued a permit for repair or alteration of an alleged defect in the sidewalk. CP 263-264 (Affidavit of Daniel H. Eaton, ¶ 8-10); and CP 296-298 (Second Affidavit of Daniel H. Eaton);

d) The City has no record of any authorized work being performed to correct the alleged defect in the sidewalk. CP 262 -264 (Affidavit of Daniel H. Eaton, ¶ 5-10); CP 298 (Second Affidavit of Daniel H. Eaton ¶ 6);

e) Similarly, there is no evidence the applicable Emerson-Garfield neighborhood council requested Community Development funds for the repair or replacement of the sidewalk in question. CP 266 -267 (Affidavit of Samuel McKee, ¶ 5); and

f) There is no evidence that Community Development funds were ever authorized by the City for repair or replacement of the sidewalk in question. CP 267 (Affidavit of Samuel McKee, ¶ 6).

Appellant's continued reliance in citing to excerpts of deposition testimony in an attempt to create questions of fact is nothing less than improper. The City brought a motion to strike those deposition excerpts used by the Appellant in her Response to the City's Motion to Dismiss as inadmissible. CP 276-281; Verbatim Report of Proceedings, pp 12-13. The trial court granted the City's motion. CP 239, CP 242-243; Verbatim Report of Proceedings, pp. 19-20. The Appellant assigns no error to the trial court's order striking the deposition excerpts. As such, those deposition excerpts are not part of the record on appeal. RAP 2.4(a); RAP 5.3(a).

Equally suspect was the reliance on the Declaration from Ernest L. Corp as there was no foundation shown for the basis of his opinion. Much of Dr. Corp's declaration was nothing more than "conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues." *McMann v. Benton County*, 88 Wn. App. 737, 740, 946 P.2d 1183, 1185 (1997), *review denied* 135 Wn.2d 1005, 959 P.2d 125 (1998). The trial court so found. CP 231, 243; Verbatim Report of Proceedings, pp. 19-20.

In short, there is no evidence the City caused the alleged defect in the sidewalk or had actual or constructive notice of a defect in the sidewalk at any time prior to July 1, 2003.

B. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN DENYING THE CITY'S MOTION TO STRIKE CERTAIN PORTIONS OF ERNEST CORP'S DECLARATION, FILED ON BEHALF OF THE APPELLANT IN RESPONSE TO THE CITY'S MOTION FOR DISMISSAL, AND/OR IN THE ALTERNATIVE, SUMMARY JUDGMENT.

The paragraphs in question are paragraphs 15 and 16 of the Declaration of Ernest L. Corp, Ph.D., P.E. in

Opposition to Defendant City of Spokane's Motion for Summary Judgment. CP 103.

The City is mindful that despite denying the City's motion to strike, on reconsideration the trial court ruled:

... the declarations of Dr. Ernest Corp do not validly create an issue of fact. They represent statements that amount to unsupported legal conclusions that are clearly outside of the realm of engineering.

CP 231, 243.

Regardless, the City felt compelled in bringing this cross review pursuant to RAP 5.2(f), if for no other purpose than to clarify and, if need be, correct the record below.

1. CR 56 Standards.

In order for affidavits and/or declarations to be considered admissible for the purposes of Summary Judgment, the affidavits need to meet the standards set forth in CR 56(e), which states in pertinent part:

... Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence. ... an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific

facts showing there is a genuine issue for trial.
If he does not so respond, summary judgment, if appropriate, shall be entered against him.

CR 56(e). (Emphasis added).

2. Dr. Corp Does Not Have the Requisite Training, Education and Experience to Substantiate the Opinions Expressed in Paragraphs 15 and 16 of His Declaration.

The City recognizes that it is not error for the court to consider an affidavit/declaration so long as the court gives it the proper weight. *King County Fire Protection Districts No. 16, No. 36, No. 40 v. Housing Authority of King County*, 123 Wn.2d 819, 872 P.2d 516 (1972); *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985). The City's position is not at odds with this authority. However, the trial court should have stricken paragraphs 15 and 16 because Dr. Corp did not have the foundation [education, training and experience] to opine with respect to trees and roots. CR 56(e).

Dr. Corp has a Ph.D. in Civil Engineering and a BS and MS in Mining Engineering. He has been working as a forensic engineer and has been engaged to render opinions in those capacities since 1973 (emphasis added). CP 101-102 (Declaration of Ernest L. Corp, ¶. 8). His curriculum

vitae indicates he has been a consulting forensic engineer in the 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) since 1973. CP 106-109.

Dr. Corp has no training, education or experience as an arborist – yet he opined: “... The obvious defect within the sidewalk was most likely caused by a tree root emanating from a tree. ...” CP 103 (Declaration of Ernest L Corp, ¶ 15). In paragraph 16 he testified: “[t]his sidewalk defect has been in existence in essentially the same manner as it is today for approximately 20 plus years as manifested by the deterioration present in the existing stump which is adjacent to the sidewalk.” CP 103.

An expert witness may give opinion evidence as long as he stays entirely within his field of expertise. *McBroom v. Orner*, 64 Wn.2d 887, 889, 395 P.2d 95 (1964); *Dobias v.*

Western Farmers Ass'n, 6 Wn. App. 194, 197, 491 P.2 1346 (1971).

Dr. Corp's opinions about tree roots and stumps were outside the field of engineering. Since he had no basis of knowledge to opine in those areas, paragraphs 15 and 16 should have been stricken by the trial court.

3. Paragraphs 15 and 16 of Dr. Corp's declaration were conclusory and invited speculation because they were not supported by admissible facts.

If the factual basis for an expert's opinion is not set forth within the expert's declaration, the opinion should not be considered. *Anderson Hay and Grain Co. v. United Dominion Ind.*, 119 Wn. App. 249, 259, 76 P.3d 1205 (2003). Conclusory or speculative expert opinions lacking an adequate foundation will not be admitted. *Safeco v. McGrath*, 63 Wn. App 170, 177, 817 P. 2d 861 (1992).

In the present case, the factual basis for the opinions expressed in paragraphs 15 and 16 were non existent. Basic facts (such as the depth of the root, how and why the root caused the defect, why the apparent deterioration of the stump indicated the length of time the defect existed, etc. ...)

were all missing. The opinions in paragraphs 15 and 16 were bare conclusions. In fact, they invited speculation. The trial court should have stricken the opinions pursuant to CR 56(e).

In summary, although the trial court placed the appropriate weight to Dr. Corp's declaration, paragraphs 15 and 16 should have been stricken because they had no factual basis, were conclusory, and invited speculation.

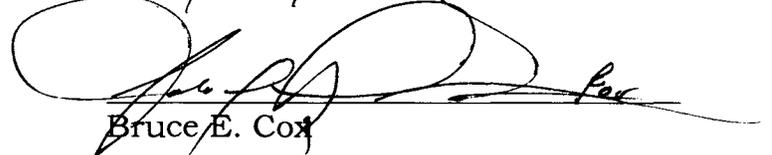
V. CONCLUSION.

For the foregoing reasons, the City respectfully requests this Court to affirm the trial court's order of dismissal and reverse the trial court's denial of the City's motion as related to paragraphs 15 and 16 of Dr. Corp's declaration.

Respectfully submitted this 26th day of July, 2010.



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DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 26th day of July, 2010, I caused a true and correct copy of the foregoing "Brief of Respondent and Cross-Appellant City of Spokane," to be delivered to the parties below in the manner noted:

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