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65177-3

No. 65177-3-I

**DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

RAEGAN McKIBBIN, a single woman,

Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation

Respondent,

PUGET SOUND ENERGY, INC., a public for-profit corporation; and
PILCHUCK CONTRACTORS, a for-profit Washington corporation, and
a subsidiary of MICHELS CORPORATION, a Washington corporation,

Defendants.

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COURT OF APPEALS
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page(s)

I. INTRODUCTION1

II. STATEMENT OF THE CASE1

 A. A history of the area in front of Plaintiff’s house.....1

 B. Pilchuck Contractors parked a backhoe on the wooden drain cover4

 C. Expert Bryan Jorgensen’s report6

 D. A Procedural history of the case7

III. ARGUMENT AND AUTHORITY.....8

 A. Standard of Review.....8

 1. The trial court’s decision to exclude an expert’s report is reviewed for abuse of discretion.....8

 2. The trial court’s decision to grant the City’s Motion for Summary Judgment is reviewed de novo.9

 B. The City of Seattle did not create the alleged unsafe condition; therefore notice is required before the City’s duty is triggered.10

 C. The Plaintiff has no evidence the City was ever put on notice, either actual or constructive.18

 D. The City does not have a duty to retrofit the wooden drain covers to “metal” and Plaintiff cannot identify any industry standard requiring the use of different material.22

 E. The trial court did not abuse its discretion by excluding Bryan Jorgensen’s unsworn report as it was irrelevant to the issue of notice.23

IV. CONCLUSION.....28

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Batten v. South Seattle Water Company</i> , 65 Wn.2d 547, 398 P.2d 719 (1965).....	15, 16
<i>Chase v. Seattle</i> , 80 Wash. 61, 141 P. 180 (1914)	10
<i>Christopherson v. Allied-Signal Corp.</i> , 939 F.2d 1106, 1109 (5 th Cir. 1991)	8
<i>Craig v. Washington Trust Bank</i> , 94 Wash. App. 820, 976 P.2d 126 (Div. 3 1999).....	10
<i>Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991)	25
<i>Doherty v. Municipality of Metropolitan Seattle</i> , 83 Wash. App. 464, 921 P.2d 1098 (Div. 2 1996).....	25
<i>Erdman v. B.P.O.E.</i> , 41 Wash. App. 197, 704 P.2d 150 (Div. 3 1985).....	14
<i>Gall v. McDonald Indus.</i> , 84 Wash. App. 194, 926 P.2d 934 (Div. 2 1996).....	9
<i>Guile v. Ballard Community Hospital</i> , 70 Wash. App. 18, 851 P.2d 689 (1993)	25
<i>Hunt v. City of Bellingham</i> , 171 Wash. 174, 17 P.2d 870 (1933)	18, 23
<i>Nibarger v. Seattle</i> , 53 Wn.2d 228, 332 P.2d 463 (1958).....	18
<i>Renner v. City of Marysville</i> , 145 Wash. App. 443, 187 P.3d 286 (2008).....	9
<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995)	22, 23
<i>Russell v. City of Grandview</i> , 39 Wn.2d 551, 236 P.2d 1061 (1951).....	10, 12, 13, 14, 16
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wash. App. 170, 817 P.2d 861 (1991)	25
<i>Slade v. Montgomery</i> , 577 S.2d 887 (Ala. 1991).....	10
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	9

<i>Sunbreaker Condominium Association v. Traveler’s Insurance Co.</i> , 79 Wash. App. 368, 901 P.2d 1079 (1995).....	8, 9
<i>Tincani v. Inland Empire</i> , 124 Wn.2d 121, 875 P.2d 621 (1994)	9
<i>Walker v. King Cy. Metro</i> , 126 Wash. App. 904, 109 P.3d 836 (2005)	9, 10, 27
<i>Wilson v. City of Seattle</i> , 146 Wash. App. 737, 194 P.3d 997 (2008).....	12
<i>Wright v. Kennewick</i> , 62 Wn.2d 163, 381 P.2d 620 (1963).....	10

COURT RULES

CR 56(e).....	24
ER 702.....	24
ER 703.....	24

ORDINANCES

SMC 21.16.030	27
---------------------	----

OTHER SOURCES

McQuillin, <i>Municipal Corporations</i> , § 54:170 (3 rd Ed. 2004).....	10, 11
WPI 140.01	10, 17, 22
WPI 140.02.....	10, 11, 17, 18

I. INTRODUCTION

This case is before the Court on review of King County Superior Court's granting of the City of Seattle's Motion for Summary Judgment, granting the City's Motion to Strike Jorgensen's Report and denial of Plaintiff's Motion to Reconsider both. The Court dismissed defendant Puget Sound Energy previously by agreement. Pilchuck Contractors moved for summary judgment after the City. The Court also granted their motion which dismissed Plaintiff's/Appellant's case. The trial court was correct in granting summary judgment to the City of Seattle (hereinafter "City") because there was no evidence the City created an unsafe condition, nor did the City have notice of such condition. The trial court was also correct in striking the report of Plaintiff's witness, Bryan Jorgensen, as his report was not relevant to the notice issue.

II. STATEMENT OF THE CASE

A. A history of the area in front of Plaintiff's house.

Plaintiff, Raegan McKibbin, sued the City for alleged injuries that occurred on October 14, 2007, when she stepped onto and fell into a wooden sandbox cover located in front of her house at 10318 Midvale Ave. N. in Seattle. CP 4-5. Plaintiff has lived at that location with her boyfriend since January 2005. CP 115-16. In the block which includes her home, there are

no sidewalks and no constructed curbs. CP 105, 151. There is an area in front of each home between the roadway and the front fences which is similar to a planting or parking strip in that it contains grass and gravel and is used by most on that block for parking. CP 151-52. Fire hydrants, some bollards, mailboxes, and drainage catch basins, inlets and sandboxes are also in this shoulder-type area. CP 140-41, 151.

Plaintiff's home is located in a part of Seattle north of N. 85th Street which was annexed by the City of Seattle in 1955. CP 103. The City inherited the sandboxes, inlets, catch basins, and the sewage and storm water drainage system from the Lake City Sewer District. CP 103. A sandbox is part of a ditch and culvert system of drainage and the top, which is visible to the public, is a roughly rectangular shaped wooden cover. CP 103. The boxes are manually constructed in the ground and the boxes themselves are usually made of treated wood or cement and extend underground about three feet. CP 103. As the name implies, they contain sand and a grate-type wooden cover to allow surface water to filter in. CP 103. The covers are made of four treated lumber boards such as the wood used for outdoor building. CP 103. The City maintains a database, the Geographic Information System ("GIS"), where it keeps track of City infrastructure such as catch basins, sewer and storm drainage lines and sandboxes. CP 163. A

search of sandboxes in this database reveals the City has 5,122 such sandboxes which take in storm water. CP 163.

Plaintiff's witness, Bryan Jorgensen, observed a variety of covers in the area of Plaintiff's house.¹ CP 197. One such sandbox is located in front of Plaintiff's home in that area between the fence and the roadway. CP 152. When she first moved in, Plaintiff noticed a single wooden board was missing and that the sides of the concrete sandbox were deteriorating and crumbling.² CP 127. The record is silent as to why the single wooden board was missing. She notified the City of the need to repair the sandbox. CP 127. The City responded and fixed the cover by replacing the missing board with treated wood and repairing the concrete edge.³ CP 103, 127, 209. Before Plaintiff's complaint in 2005, the City received no complaints of problems or requests for repair of the wooden cover. CP 103. Plaintiff has testified that after the City repaired the cover in 2005, she and her boyfriend

¹ Plaintiff inaccurately states that other drain covers in the area of Plaintiff's house were of the same "design and vintage" as the subject drain and that they had been "replaced with metal drain cover grates." Appellant's Brief at 8. There is no evidence in the record that this was the case. Some are covers for catch basins and inlets which serve different storm drainage needs and may have been there even before 1955.

² Plaintiff incorrectly writes that "pieces of it lying inside the street drain" and that "one side of it [frame] sunk somewhat into the ground." Appellant's Brief at 7. This is nowhere in the record.

³ Plaintiff inaccurately writes that the City rebuilt the street drain and that the City "removed all of the wooden boards" and "poured new concrete forms to rebuild the concrete frame where one of the sides had sunk and crumbled." Appellant's Brief at 8. This is not in the record.

jumped up and down on the cover to test its strength and she reports it seemed fine. CP 127. From the time of that repair, until the date of her accident, she did not complain about the sandbox or its cover to the City, nor did anyone else. CP 103, 127, 137.

Before her accident in the instant case, Plaintiff believed the cover, even though it was made of wood, could support the weight of her body. CP 129. Having lived in that home for over two years, Plaintiff acknowledges she walked over the sandbox “many times before this incident. . . .” CP 126. When asked if she made a point of avoiding the sandbox cover she said “no” and explained she “didn’t really think about the grate. It didn’t, you know, bother me too much.” CP 127. In fact, Plaintiff had come to rely on the strength of the wooden cover saying that before her accident in this case, she had stepped on it and “nothing had ever happened.” CP 127. She parks her car in front of her house every day. CP 127. Plaintiff runs a tattooing business out of her home and had clients arriving at her home on a regular basis. She never felt the need to warn any of her clients to avoid stepping on the cover or to avoid driving on the cover. CP 131.

B. Pilchuck Contractors parked a backhoe on the wooden drain cover:

After the City repaired the cover, more than two years passed without any complaints to the City from anyone about the sandbox or the

cover. CP 103. From September 11-19, 2007 Pilchuck Contractors performed work on the gas line under contract with Puget Sound Energy along parts of Midvale Avenue North. CP 156. While Pilchuck was working on their block, Plaintiff and her boyfriend saw a backhoe parked on top of the wooden cover and they saw Pilchuck employees standing around and pointing at the cover after they moved the backhoe. CP 138. After the workers left, Plaintiff and her boyfriend came out to inspect the cover and found a tire track on the cover. CP 149. She said it appeared “compromised.” CP 143. When asked to elaborate she explained:

There was a big tire mark on it from where you could see where the tire had been. And it was sitting a little bit lower than the rest of the boards in there so it seemed like it maybe had – I went out thinking it might possibly have been broken but I couldn’t see any visible things wrong other than it was maybe an inch or two lower than the other pieces of wood on that spot where the weight of the machine had made it lower a little bit. [. . .] But yeah, it was different than what it looked like before.

CP 149. So in mid-September 2007, as they had done before, Plaintiff and her boyfriend jumped up and down on the cover to test its strength. CP 143. Again, it seemed sturdy. CP 143. Accordingly, they saw no reason to notify the City of a problem because in their opinion, the cover “appeared fine.” CP 139. Pilchuck also did not notify the City of the incident. CP 103. The City has no record of any other complaints regarding the cover in question that would put the City on notice of a dangerous condition. CP 103.

Plaintiff explained that before Pilchuck's backhoe was parked on it, "there was not a problem until that happened." CP 148.

Plaintiff concedes that because Pilchuck parked a backhoe on the drain cover just one month before Plaintiff fell into it that the backhoe "caused some damage to the wooden street drain" CP 182. Plaintiff's expert also concedes this is the only explanation for why this wood could not bear Ms. McKibbin's weight. CP 197. He says Plaintiff's "recollection of the heavy equipment stressing the grate cover is the **only** reasonable explanation for the ultimate failure of a beam of such dimensions." CP 197. (emphasis added).

Just one month later on October 14, 2007, Plaintiff was getting into her car to visit a friend. She exited the car to check the oil before departing and stepped on the wooden cover. One of the four pieces of wood broke, and her left foot and leg landed in the sandbox. CP 144.

C. Expert Bryan Jorgensen's report

Plaintiff disclosed expert Bryan Jorgensen as an engineer. CP 88. He is not an engineer. CP 206. Jorgensen is an accident reconstructionist with a bachelor's degree from WSU in general physics. CP 206. According to his *curriculum vitae*, he also completed an accident reconstruction course 15 years ago at Northwestern University's Traffic Institute. CP 206. He is currently the managing partner for Northwest

Casualty Claims Service. CP 206. Jorgensen has no engineering training or experience listed on his CV. CP 206.

Plaintiff's counsel signed a declaration attaching Bryan Jorgensen's ("Jorgensen") report in opposition to the City's Motion for Summary Judgment. CP 194-206. Jorgensen's CV was also attached to his report. CP 206. Plaintiff did not provide the Court with a declaration or affidavit from Jorgensen himself. CP 184-206. Once this was brought to the Court's attention via the City's Motion to Strike, Plaintiff then filed a Declaration from Jorgensen in response. CP 284.

The trial Court struck Jorgensen's report as irrelevant to the notice issue. CP 321.

D. A Procedural History of the Case

The Agreed Narrative Report of Proceedings provides an accurate recitation of the procedural history so it will not be repeated here. The City urges this Court to refer to that Narrative as it provides a more accurate recitation of the procedural history than Plaintiff's brief.⁴ Plaintiff originally filed a Narrative Report of Proceedings with this Court on June 22, 2010. The City noted objections to that version of the report. The parties then collaborated and prepared an Agreed Narrative Report of Proceedings to

⁴ Plaintiff's summary on pages 14 and 15 of Appellant's brief repeatedly misstates the year of the filings as 2009 instead of 2010.

replace the one delivered on June 22, 2010. Any references in this brief will be to the Agreed Report of Proceedings (RP).

The trial Court granted Pilchuck's motion for summary judgment but did not make any specific findings of fact or conclusions of law in its order.⁵ CP 324-325. Also, Plaintiff's recitation of the dates regarding the motion for reconsideration is incorrect.⁶ RP 3.

III. ARGUMENT AND AUTHORITY

A. Standard of Review

1. The trial court's decision to exclude an expert's report is reviewed for abuse of discretion.

"The standard of review for trial court evidentiary decisions, including those made in the course of summary judgment proceedings, is abuse of discretion." Sunbreaker Condominium Association v. Traveler's Insurance Co., 79 Wash. App. 368, 372, 901 P.2d 1079, 1082 (1995) *citing* Christopherson v. Allied-Signal Corp., 939 F.2d 1106, 1109 (5th Cir. 1991) *cert. denied*, 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992). A review of the trial court's ruling on the motion to exclude the expert's

⁵ Plaintiff claims specific findings of fact and conclusions of law in her Appellant's Brief at 17. These are not in the record.

⁶ The City filed a response on March 5, 2010 not March 6th. Plaintiff filed her reply on March 10, 2010 not March 9th which was the due date. Accordingly the Court did not consider her reply in denying the motion to reconsider and it is stricken from the Court's Order. Appellant's brief at 17. CP 379.

declaration, or in this case a report, will then define the remaining record which is subject to de novo review. Id. at 373. A trial court abuses its discretion when its order is “manifestly unreasonable or based on untenable grounds.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

2. The trial court’s decision to grant the City’s Motion for Summary Judgment is reviewed de novo.

In de novo review, the appellate court must conduct the same inquiry as the trial court and view all material facts and reasonable inferences from them most favorably to the appellants. Renner v. City of Marysville, 145 Wash. App. 443, 448-49, 187 P.3d 283 (2008). Summary judgment is appropriate if the pleadings, affidavits, and depositions establish both the absence of genuine issues of material fact and movant’s entitlement to judgment as a matter of law. Id. Whether the City owed a duty, and the nature of that duty (the standard of care) are questions for the court to decide. Tincani v. Inland Empire, 124 Wn.2d 121, 875 P.2d 621 (1994); Gall v. McDonald Indus., 84 Wash. App. 194, 202-03, 926 P.2d 934 (1996). Where a plaintiff does not produce evidence sufficient to show that the defendant breached “the *required* standard of care,” summary judgment must be entered. Walker v. King Cy. Metro, 126 Wash. App. 904, 908, 109

P.3d 836 (2005) (emphasis added). A non-moving party may not rely on speculation or argumentative assertions to defeat summary judgment. Craig v. Washington Trust Bank, 94 Wash. App. 820, 824, 976 P.2d 126 (1999).

B. The City of Seattle did not create the alleged unsafe condition; therefore notice is required before the City's duty is triggered.

Cities have a duty to exercise ordinary care in the design, construction, maintenance and repair of their public right-of-ways to keep them in reasonably safe condition for ordinary travel. WPI 140.01. Under Washington Law, a municipality only has a duty to repair a defect in a public way if it has notice of the defect in question. Russell v. City of Grandview, 39 Wn.2d 551, 554, 236 P.2d 1061 (1951); See also WPI 140.02. This has been the long-standing rule in Washington. See Wright v. Kennewick, 62 Wn.2d 163, 167, 381 P.2d 620 (1963); Chase v. Seattle, 80 Wash. 61, 64, 141 P.180 (1914). Most jurisdictions agree that notice must be shown. See McQuillin, Municipal Corporations § 54.170 (3rd Ed. 1994). Cities have no duty to seek out “defective” conditions and rectify them. Slade v. Montgomery, 577 S.2d 887, 893 (Ala. 1991). Even if a City has notice of an unsafe condition, a City is then entitled to a reasonable opportunity to correct the condition. Wright, 62 Wn.2d at 167.

The notice exception applies as long as the City did not; 1) *create* the unsafe condition; 2) *cause* the unsafe condition through City negligence; or 3) *fail to reasonably anticipate* the unsafe condition would develop. WPI 140.02 (emphasis added). Since Cities design, construct, maintain and repair a variety of infrastructure, the notice must be of the specific unsafe condition that caused Plaintiff's injury, not just notice of the street, sidewalk or other right-of-way itself:

The view has been expressed that the notice must be of the defect itself which occasioned the injury, and not merely of conditions naturally productive of such defect and afterwards in fact producing it; that not only must there be notice of the defective condition of the public way giving rise to the injury, but also notice of the defective character of the condition.

McQuillin, *supra* § 54:170 at 555.

The City did not *create* the ditch and culvert system of which this sandbox (street drain) cover is but one small part. The City furthermore did not park any heavy machinery on the cover or *cause* it to be compromised in any way. The cover had held up nicely for years with no complaints to the City. CP 103. There would be no reason then for the City to reasonably anticipate a problem with this cover. Plaintiff argues the City created the sandbox and the wooden cover and therefore notice is not necessary before the City's duty applies.

In a recent case, this Court explained that Plaintiff has the burden of showing the City had, not just notice of a condition, but notice of a dangerous condition before liability can attach. Wilson v. City of Seattle, 146 Wash. App. 737, 194 P.3d 997 (2008). In Wilson the City had installed a manhole cover in a parking strip which contained a water valve. Id. at 739-40. The manhole cover was in a public place and the cover was not locked so anyone coming along could tamper with it. Plaintiff in that case stepped on the cover and fell in when one side flipped up. Even though the City had installed the cover, the Wilson Court applied the notice requirement in affirming summary judgment for the City. There were no prior accidents reported for the manhole cover and Ms. Wilson reported it appeared fine whenever she passed by. Id. at 742. She “therefore, failed to establish the City knew of the dangerous condition and was negligent for failing to correct, repair, or warn of it.” Id. Accordingly, it was not enough to argue the City created the condition by installing the manhole cover. Plaintiff had to prove the City had notice the cover was in a dangerous condition such that it would allow plaintiff to fall in.

Plaintiff, to support her argument that notice need not be shown, cites to a case where the City of Grandview knowingly introduced an explosive gas into its water system. Russell, 39 Wn.2d 551. In Russell

the Supreme Court affirmed judgment for the Plaintiff and against the City explaining Russell did not have to show notice as the City itself had created the dangerous condition. Id. In doing so the Russell Court rejected the City's argument that their case was analogous to a right-of-way defect case. The Court explained:

The City seeks to draw an analogy between the facts of this case and those involved in cases where injuries were sustained arising out of defects in streets or sidewalks, or obstructions in the way of normal use thereof, or breaks in pipes carrying gas. 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.*

Id. at 554 (emphasis added). In *Russell* there was evidence the City knowingly permitted an explosive gas to enter its water system. Id. at 554. There was evidence the gas came from wells and that it was combustible. The City had received complaints because the gas was interfering with water flow. Id. And lastly, the City's water superintendent advised the injured party to open the faucets to relieve some of the gas pressure. Id.

The Russell Court confirms that cases such as the instant case require notice before the City's duty arises. Id. at 554. Cases which involve an alleged defect located in the right-of-way and involving a claim

that the City was negligent in failing to keep the wooden cover in a proper state of repair are distinguishable from the facts in Russell. Id. at 554.

The other case cited by Plaintiff has even lesser application to the instant case. That case from Division Three involved an ongoing dishwasher pipe issue which resulted in a soapy floor located in a private club's kitchen with evidence a waitress had already fallen over 12 times and notified five managers. Erdman v. B.P.O.E., 41 Wash. App. 197, 704 P.2d 150 (1985). The club, B.P.O.E., assigned error to the trial Court's rejection of a notice jury instruction. The Erdman Court agreed with the trial court writing that the dangerous condition, "related to a slippery condition created by a combination of circumstances, all of which had been present for an extended time." Id. at 205-6. Those circumstances involved a floor that was improper for a commercial kitchen, a leaky pipe which allowed soapy water onto the floor and the absence of runners and mats on the floor. The Court presumed the jury followed the jury instruction finding that there the landowner had created the problem by improperly installing a dishwasher pipe which caused water to leak onto the floor creating a soapy floor with a friction co-efficient of melting ice. Id. at 199. Plaintiff did not have to show notice as the landowner had created the dangerous condition. Id. at 205-6.

In the case now before the Court, the City installed and replaced a missing wooden board. The case is distinguishable from the outset with Erdman in that the City did not install a dangerous condition. The issue is not did the City know the street drain cover was made of wood, the issue is did the City create a dangerous condition. The law certainly does not impose liability on the City for the mere presence of its infrastructure, there must be some reason for the City to know it is dangerous. With no prior accidents and Plaintiff's lone report of one solitary missing board – the cause of which is unknown – the City cannot have known the condition was dangerous. It cannot be mere coincidence that Pilchuck's backhoe is parked on top of the wooden cover and appears compromised just one month before Plaintiff's accident. The dangerous condition that existed was temporary and short lived. Just one month had passed since Pilchuck was in the area. Here, the circumstances are unlike those in Erdman with a dozen prior accidents and a condition that existed for "an extended time."

Plaintiff also cites to the Batten v. South Seattle Water Company, 65 Wn.2d 547, 398 P.2d 719 (1965) case which is also factually distinguishable. Batten involves an appeal from a jury verdict for the plaintiff who stepped on a water meter box lid which shifted and gave way because debris had become lodged around the edge. Plaintiff's theory in

that case was that the particular meter box was installed by the water company in such a way that it created a dangerous condition. Id. at 547. The meter box cover was a flat steel lid that rested on a rim or lip of concrete. It had a small 5/16” recess around the edge between the rim and each edge of the steel cover. Apparently dirt or other small rock particles could accumulate in the recess and cause the cover to fit improperly or slide off. Ms. Batten had the misfortune of stepping onto the lid which gave way and she fell in with one leg. Id. at 548-49. Two engineers, with experience in water works design and installation, testified that the cover may be appropriate for some locations but not for the location in Batten. Id. at 550. The cover was located at the bottom of a steep grade where gravel was known to accumulate. Id. at 550. So ultimately, the material used, the allowance of a recess around the edge, the location at the bottom of a steep grade and the presence of gravel were all decisions the water company made in choosing to install the meter cover in that location.

The Batten Court cited to Russell, supra in holding “where a municipal corporation creates the dangerous condition, no notice is required.” Id. at 551. In reaching that decision the Court considered; 1) The fact that the water company could not articulate the last time they had inspected the lid; 2) There was no evidence a third party had tampered with the lid; and 3) The specific decision of the City to create the

condition and locate the lid at the bottom of a steep decline in a pathway used by pedestrians where gravel obviously accumulated.

Unlike the line of cases cited by Plaintiff, the City did not create this condition but inherited the storm drainage system that was already in place. Admittedly, the City does have a duty to maintain that system. WPI 140.01. But when notified of a need to repair the cover, the City responded and repaired the edge and replaced one missing board. Those four boards remained in place until Plaintiff's accident on October 14, 2007. Plaintiff's single call in 2005 is the only complaint on record. The City did not create a wooden cover that was on the verge of breaking by parking heavy machinery on it or by jumping up and down on it.

The notice requirement refers to knowledge by the City of an "unsafe condition." WPI 140.02. It is not enough to say the City had notice that the cover was made of wood or that one piece of the cover needed a repair. This is especially true since no one knows the cause of that one missing board in 2005. It would be purely speculative to say that condition in 2005 was caused by the wood material failing. It is just as likely the cover was vandalized. Since the City did not create the sandbox, the lid or the break in one of the boards and there is no evidence the City knew of any unsafe conditions of the sandbox, notice is required

before the City's duty is triggered. WPI 140.02. Summary judgment dismissal was warranted here.

C. The Plaintiff Has No Evidence the City was Ever Put on Notice, Either Actual or Constructive.

Notice to the City may be actual or constructive. WPI 140.02. In order to prove constructive notice, Plaintiff must show the dangerous condition existed long enough such that the City ought to have known about the condition. Nibarger v. Seattle, 53 Wn.2d 228, 332 P.2d 463 (1958). The Washington Supreme Court held lack of notice supported dismissal of a case against the City of Bellingham. Hunt v. City of Bellingham, 171 Wash. 174, 17 P.2d 870 (1933). In Hunt, a woman fell into a wooden water meter box on the side of the road. The cover, in some unknown way, had been removed. Plaintiff in that case had complained to the City a year before her accident, and the City had made a repair. A year passed and the Court noted,

“There is no evidence that during that time any complaint, either by respondent or by any one else, was made to the city regarding the box or its lid. Assuming that the meter box or lid had become insecure or dangerous within the latter period, there is no evidence of notice to the city of its condition.

Hunt, 171 Wash. at 176-77.

The plaintiff's complaint here is the same complaint advanced by Hunt about the material used. Specifically:

Respondent seems to have desired either an iron cover upon the box, or else one with hinges and a lock on it; this desire on her part appears to be the basis of her present complaint. The city's duty in installing and maintaining its equipment in or about its streets *is not measured by the desires of adjacent property owners, but by the rule of reasonable care under the existing circumstances.*

174 Wash. at 177 (emphasis added).

Similarly here, the City had repaired the lid, then over 2 ½ years passed with no complaints from anyone. The unsafe condition in the instant case would be the compromised cover to the sandbox such that it could not hold Plaintiff's weight. Neither plaintiff nor her boyfriend, nor any other person of record ever called the City to complain of this cover (or of the wooden nature of the cover). There is simply no evidence the City had any notice of the compromised condition alleged.

The narrow question here, accordingly, is whether the compromised sandbox cover existed for a sufficient period of time for the City to have constructive notice of its existence, and a reasonable opportunity to correct the condition. Here, it is undisputed that (1) the structural stability of the wooden cover was never questioned before 2005; (2) the City never received any complaints of the condition after replacing a missing board in January 2005; and (3) Plaintiff has said the cover did not appear damaged by the heavy machinery in September, 2007. CP 103.

The window of time needed to elapse then, for the City to be held to constructive notice of a dangerous condition cannot be established, as Plaintiff cannot point to any period of time in which the City should have known that cover was compromised.

Assuming the sandbox cover was somehow compromised around the time of the Pilchuck's construction work of September, 2007, the City was never put on notice, nor was it given time to rectify any alleged defects before the Plaintiff's injury. The plaintiff herself even testified in her deposition that she and her boyfriend inspected the cover immediately after the backhoe moved, and "[I]t didn't seem like there was anything other than just the tire track on it...but it wasn't broken...So we just assumed that it was fine." CP 139. They even proceeded to jump up and down on the cover and did not notice anything that would compromise its safety and durability. CP 138-39.

Since the cover could support the weight of a backhoe and, subsequently, the weight of two adults jumping on it in September, 2007, it can likely be said either 1) it was plaintiff and her boyfriend jumping on the board that caused the damage, or 2) it was not damaged at that time. Either way Plaintiff cannot meet her burden of proof here. As she lives directly next to the sandbox and drove and walked across it daily, Plaintiff

was in a much better position to be aware of the cover's condition. After testing the cover's strength, she saw it fit to continue parking and driving on and around the grate cover right up until the time of her accident. Perhaps something occurred in the one month between mid September, 2007, and October 14, 2007, when her injury occurred to weaken the board, but that "something" could have been anything. It may have been vandalized. This would be pure speculation and ultimately Plaintiff cannot point to any time prior to October 14, 2007, where she knew the cover was damaged. Where Plaintiff herself cannot identify any time prior to her accident at which she observed damage to the board, it cannot be claimed the City should have so identified any defective condition.

Plaintiff's call to the City in 2005 does nothing to prove notice regarding the 2007 incident in question. In that instance, Plaintiff notified the City that a board was missing. CP 127. The cause of the missing board has never been identified, or even surmised at by either side. The board was subsequently replaced by the City, and no one complained to the City about the sandbox cover again until the incident in question here. CP 103. There was no allegation in 2005 that the wooden cover was somehow inadequate or that the wood should be replaced by iron or other metal, which is what the Plaintiff now claims.

Given the thousands of street and sidewalk miles in Seattle, the notice requirement is a necessary limit on the scope of the City's duty. If the City were not allowed to rely upon citizen and employee complaints for information about defects, the City would be held, without fault, to the impossible standard of maintaining thousands of miles of public ways in perfect condition at all times. The City cannot know the exact condition of all of its sidewalks, crosswalks, and roadways at all points in time. The City must rely on complaints and other reports from those who observe defective conditions. Without notice, no duty arises.

D. The City does not have a duty to retrofit the wooden drain covers to "metal" and Plaintiff cannot identify any industry standard requiring the use of different material.

There is no requirement that the City upgrade or retrofit all of its sandbox covers from treated wood to another type of material. Cities have a duty to maintain roads, streets and sidewalks to keep them in "reasonably safe condition" not absolutely safe condition for ordinary travel. WPI 140.01.

The City is not expected to, "anticipate and protect against all imaginable acts of negligent drivers' for to do so would make . . . [the City] an insurer against all such acts." Ruff v. King County, 125 Wn.2d 697, 705, 887 P.2d 886 (1995). The City's duty also does not require the

City to update every road and roadway structure to present-day standards.

Id. As the Supreme Court explained in Hunt v. City of Bellingham, *supra*

22. “The city’s duty in installing and maintaining its equipment in or

about its streets *is not measured by the desires of adjacent property*

owners, but by the rule of reasonable care under the existing

circumstances.” Hunt at 177. (emphasis added). The Ruff Court found it

significant that Ruff could not cite any ordinance or statute which required

King County to install a guardrail on a particular road. Ruff at 705.

Ruff’s experts could not cite any AASHTO⁷ standards requiring such a guardrail.

Similarly here, Plaintiff cannot cite to a single statute, ordinance or industry standard which requires sandbox covers to be made of a different material or to be updated to 2010 standards. The City’s obligation is to maintain this cover in reasonable safe condition considering its location in a gravel and grass covered area in front of Plaintiff’s home, a residential area.

E. The trial court did not abuse its discretion by excluding Bryan Jorgensen’s unsworn report as it was irrelevant to the issue of notice.

⁷ American Association of State Highway and Transportation Officials

The trial Court granted the City's Motion to Strike Jorgensen's Report. CP 321. In finding that the Plaintiff could not show the City had notice of a dangerous condition, Jorgensen's Report was stricken as irrelevant. RP 3. ER 402, 702. Jorgensen did not visit the site of Plaintiff's fall until almost two years after her accident. CP 195. Except for Plaintiff's testimony, Jorgensen had no other information about the history of this drain cover and what the City knew or did not know about the cover on the day of Plaintiff's accident. He was unable to shed any light on the reason for the missing board in 2005. Given these facts, Jorgensen's report was not relevant to whether the City had notice of a dangerous condition.

Even if Plaintiff here could meet the high burden of showing the trial court abused its discretion, there are other hurdles to Jorgensen's testimony. CR 56(e) requires "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts *as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." (*Emphasis added*). Evidence Rule 702 allows testimony by an expert who is qualified based on "knowledge, skill, experience, training, or education. . . ." ER 703 requires that expert opinion testimony be based on specific facts or data. Before an expert will be permitted to offer such opinion testimony, the court must determine whether data relied upon is of a kind that is reasonably relied upon by experts in forming opinions or inferences upon the

subject in their particular field. It is well established that “conclusory or speculative expert opinions lacking in adequate foundation will not be admitted.” Safeco Ins. Co. v. McGrath, 63 Wash. App. 170, 177, 817 P.2d 861 (1991).

Under CR 56(e), affidavits containing conclusory statements without adequate factual support are insufficient in summary judgment proceedings. Guile v. Ballard Community Hospital, 70 Wash. App. 18, rev. denied, 122 Wn.2d 1010 (1993); *See also* Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772 (1991) (the opinion of an expert which is only a conclusion or which is based on assumptions is not evidence which satisfies summary judgment standards because it is not evidence which will take a case to the jury).

Trial courts can exclude affidavits of an expert submitted in support of a summary judgment motion if the affidavit fails to explain how an expert was qualified to render his opinions. Doherty v. Municipality of Metropolitan Seattle, 83 Wash. App. 464, 468-69, 921 P.2d 1098 (Div. 2 1996). Doherty failed to qualify his biomechanical engineering expert to give an opinion about the amount of force necessary to cause death or disabling injuries.

Mr. Jorgensen is an accident reconstructionist. Based on the material submitted to the Court by plaintiff, Mr. Jorgensen has no experience, education, or training in engineering, wood science, wood deterioration, wood structures, wood mechanics, wood decay, wood failure, wood performance, wood design,

wood products, wood and moisture relationships or any related fields. Mr. Jorgensen does not appear to have any experience, education, or training in water and drainage systems, metal drain covers, metallurgy, metallurgical failure analysis or metallurgical engineering. Mr. Jorgensen's experience, education and training are instead in accident reconstruction, overwhelmingly involving vehicle crashes.

Under the paragraph entitled "Deterioration" Mr. Jorgensen tells us about the nature of wood and the effects of moisture exposure over time. He states no basis for these statements and nothing in his background qualifies him to conclude that wood vaguely "deteriorates over time." CP 197. How much time is anyone's guess. What type of wood he is referring to is also open to speculation. He then says that, "after 3 months the beam would have been even weaker." He concludes the beam would be weaker without quantifying the strength and without explaining how he is qualified to make such a statement. Finally, he states that "metal used in grate covers deteriorates exponentially more slowly than wood, and it is generally much stronger as well." CP 197. There is no discussion in his report on the type of wood, the type of metal, his definition of exponentially and again, his qualifications to make such statements.

In the Conclusion section of his report, Jorgensen adds his opinion about the type of material that *should* be used for sandbox or street drain covers. He makes his statement without any expertise or training in municipal or private

water and drainage systems and without citing this Court to any industry standard or requirements. He also opines that “The overwhelming material of choice for such applications is steel, or iron.” Again, there is no basis cited for his conclusion.

In a nutshell, Plaintiff offers Mr. Jorgensen to say that wood was an unreasonably dangerous material to use for the sandbox cover in front of Plaintiff’s home. In his supplemented declaration he admits that there is no standard or specification or any statutory requirement the City is violating by maintaining the wooden covers. CP 288-89. Where a plaintiff does not produce evidence sufficient to show that the defendant breached “the *required* standard of care,” summary judgment must be entered. Walker, 126 Wash. App. at 908. He also cites no authority for the argument that the City must change the material used. Since he lacks knowledge, experience or training in sandbox covers he declares that he conducted an “extensive search on drain covers” yet does not explain *how* he went about this search or *where* he looked. CP 289. He says that he discovered one lone wood cover in Boston. CP 289. He must have missed the 5,000+ located right here in Seattle. His declaration does not demonstrate a knowledge of the different types of drain covers such as sandboxes, catch basins, or inlets just to name a few. SMC 21.16.030. Without this knowledge, his conclusions lack foundation.

IV. CONCLUSION

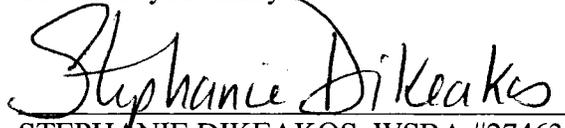
For the foregoing reasons, the trial court's order granting summary judgment to the City of Seattle and striking the expert's report should be affirmed.

DATED this 9th day of September, 2010.

Respectfully submitted,

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