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No. 67723-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON, SEATTLE

LARRY ALMO and ILYSE ALMO, husband and wife, ESTHER ALMO,
a minor child, by an through her mother, ILYSE ALMO,

Plaintiffs/Appellants,

vs.

CITY OF SEATTLE,

Defendant/Respondent.

BRIEF OF RESPONDENT CITY OF SEATTLE

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I. INTRODUCTION

Larry Almo was injured when he tripped and fell on an uplifted panel of a Seattle sidewalk. He and his family sued the City of Seattle for damages, alleging that the uplift, which was less than one inch high, represented a breach of the City's duty to keep its sidewalks in reasonably safe condition. The City moved for summary judgment based on the City's lack of notice of the uplift. It is undisputed that the City had no actual notice of the sidewalk's condition, and the Almos produced no evidence from which a jury could reasonably conclude that the City had constructive notice. The City's motion was granted, and the Almos' suit was dismissed.

The Almos argued below, and reargue here, that the City was under a duty to inspect its sidewalks on an ongoing basis, and would have discovered the uplift had it done so. But there is no legal requirement of inspection. To effectuate sidewalk repairs, the City relies chiefly on complaints of defects from citizens and on reports from adjacent property owners. The Almos produced no evidence that this manner of sidewalk maintenance was ineffective, or a poor use of available resources, or somehow failed to meet recognized standards of infrastructure management.

Summary judgment should be affirmed because of the absence of evidence going to the City's notice of the uplift and to the failure of ordinary care in sidewalk maintenance.

II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENT OF ERROR

Appellants' Notice of Appeal seeks review of the trial court's Order Granting City of Seattle's Motion for Summary Judgment of June 10, 2011 and of its Order Denying Plaintiffs' Motion for Reconsideration of September 6, 2011. CP 259-266. Appellants' brief, fairly read, assigns error to the trial court's granting of summary judgment, but there is no separate assignment of error to the denial of the motion for reconsideration. Moreover, while the issues pertaining to the granting of summary judgment can be discerned in the assignment of error, there is no statement of issues pertaining to the denial of the motion for reconsideration.

The City identifies the following issues as pertaining to appellants' assignment of error to the granting of summary judgment and to the denial of the motion for reconsideration:

1. Have appellants offered evidence that the City's sidewalk maintenance regime, which relies chiefly on complaints from citizens and

reports of hazards from adjacent property owners, fails to meet the standard of ordinary care?

2. Does the City have a duty to inspect its sidewalks in the absence of notice of a dangerous condition thereon?

3. Did appellants produce evidence sufficient to demonstrate that the hazard alleged in this case existed long enough to confer on the City constructive notice of the condition?

4. Did the trial court abuse its discretion in denying appellants' Motion for Reconsideration, where the motion was not based on newly discovered evidence or any other ground enumerated in CR 59?

III. STATEMENT OF THE CASE

On February 22, 2008, Larry Almo tripped and fell when his foot struck an uplifted sidewalk panel on the 6500 block of 52nd Avenue South in Seattle. CP 1. The sidewalk runs in front of the synagogue where Mr. Almo has been a member his entire life, and where he has served as a volunteer on a daily basis for at least 20 years. CP 20, 21, 28. He has walked on this sidewalk often over the years, but does not claim to have observed any defective condition prior to the day of his accident. CP 29. Two large trees are on the synagogue grounds in close proximity to the accident site identified by Mr. Almo. CP 43. Based on the trees' location,

it is more probable than not that that the uplift in the sidewalk was caused by the growth of either or both of the trees' roots. CP 43. These trees were not planted by the City, and are not part of the City's tree inventory. CP 43. In April 2011, nearly three years after Mr. Almo's accident, the uplift at the accident site was less than one inch. CP 88.

There is no record of complaints to the City regarding the condition of the sidewalk in question prior to February 22, 2008. CP 45. Although the synagogue has a congregation of about a thousand, the City only learned of the uplift from the synagogue's office manager three days after Mr. Almo's accident. CP 29, 45, 63. Three days after that, a City work crew applied an asphalt repair at the location identified by the synagogue. CP 45-46.

The City of Seattle has some 2,000 miles of sidewalks. CP 46. Except for inspections associated with new construction or restoration made under permits, the City does not routinely inspect sidewalks in order to ascertain their condition. CP 40. Instead, the City relies on notice of defects from citizens, and maintains four complaint lines for that purpose. CP 40. The City also relies on property owners to report hazards they discover in adjacent public places, as required by ordinance. CP 40. About 150 maintenance workers were available to repair all paving infrastructure, including sidewalks, at the time of the accident alleged in

this case. CP 46. It is the City's policy that the Seattle Department of Transportation respond to citizen complaints as quickly as possible, given the extent of its sidewalks and the limitations on its resources. CP 46. When funding is available, the City will also target for inspection areas of high pedestrian usage which have had a history of reported problems. CP 40.

The City moved for summary judgment of dismissal on May 13, 2011. CP 7-14. The motion was granted on June 10, 2011. CP 144-45. The Almos timely moved for reconsideration on June 20, 2011. CP 148-161. At the trial court's request, the City filed a brief in opposition to the motion for reconsideration, CP 236-243, to which the Almos replied. CP 246-255. The court's order denying the motion for reconsideration issued on September 6, 2011. This appeal followed.

IV. ARGUMENT

1. Summary judgment should be affirmed because appellants offered no evidence that Seattle's sidewalk maintenance regime represents a failure of ordinary care.

A trial court's grant of summary judgment is subject to de novo review. *Green v. A.P.C.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Summary judgment is appropriate if there is no genuine issue of material fact and the party bringing the motion is entitled to judgment as a matter

of law. CR 56(c). If the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial,’ then the trial court should grant the motion.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Seattle, like all cities, is under a duty to maintain its sidewalks in reasonably safe condition for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). A city can be found liable for an unsafe condition which it did not create only if it had actual or constructive notice of the condition, *Nibarger v. City of Seattle*, 53 Wn.2d 228, 229-30, 332 P.2d 463 (1958). In this case, it is undisputed that Seattle neither created the sidewalk uplift, nor had actual notice of it prior to Mr. Almo’s accident. CP 43, 45. Summary judgment should be affirmed because the Almos failed to present evidence that the City had constructive notice of this sidewalk uplift of less than one inch.

Constructive notice to the City “may be inferred from the elapse of time a dangerous condition is permitted to continue when it is long enough to be able to say that it ought to have known about the condition.” *Nibarger, supra*, at 230. It follows from this formulation that constructive notice in this case is closely linked to a determination of whether the City

fulfilled its duty to exercise ordinary care in maintaining its sidewalk infrastructure. That is, if there is no evidence of a failure of ordinary care, it cannot be said that although the City did not discover the uplift, it *ought* to have. As a leading commentary observes, “if facts exist with which ignorance is not compatible, except on the assumption of failure to exercise reasonable official care, notice will be presumed.” 19 McQuillin, *The Law of Municipal Corporations*, § 54:181, pp. 590-91 (3rd ed., 2004 rev.). Constructive notice, in other words, presumes unreasonable conduct. For example, in *Hartley v. Tacoma School Dist. No. 10*, 56 Wn.2d 600, 354 P.2d 897 (1960), cited by the Almos, there was evidence that city maintenance crews sanded and salted crosswalks and streets in the vicinity of the accident site at least three times during the preceding six-day period. *Id.*, at 602. In such circumstances, how could the crews *not* have discovered the ice which caused the accident, unless they were negligently inattentive? Likewise, to defeat summary judgment here, the Almos needed to show that that the City didn’t discover the uplift *because* it was negligent. In the absence of evidence that City crews somehow failed to observe the uplift, such showing required evidence that the very way the City maintains its sidewalk infrastructure itself represents a failure of ordinary care. No evidence of this kind was produced below.

In fulfilling its duty to keep its sidewalks in good repair, the City relies on citizens to report problems, maintaining four complaint lines for that purpose. CP 40. If there have been frequent complaints in a particular area, the City will target the area for inspection, and inspections may also be initiated when additional funding becomes available for specific projects under Seattle's Bridging the Gap initiative.¹ CP 40. The City's street maintenance workers are instructed to report hazards they happen to observe. CP 40. The City also relies on an ordinance requiring adjacent property owners to, among other things, promptly inform the appropriate City bureau if they discover a hazard in a public place. CP 40; SMC 15.18.010.² It is the City's policy to respond to complaints of sidewalk defects as quickly as possible, given the extent of the sidewalk infrastructure and the resources available. CP 46. The Almos presented no evidence that these practices are an inefficient way to effectuate sidewalk

¹ Bridging the Gap is the name given to a nine-year, \$365 million levy for transportation maintenance and improvements passed by Seattle voters in 2006. CP 12.

² In addition to the requirements of SMC 15.18.010, landowners are under a duty exercise care that tree roots on their property do not pose an unreasonable risk of harm to pedestrians using adjacent sidewalks. *Rosengren v. City of Seattle*, 149 Wash.App. 565, 575, 205 P.3d 909 (2009). This does not relieve the City of its own duty towards pedestrians, but the Almos fail to show that it is unreasonable for the City to rely on owners, such as the synagogue in this case, to eliminate risks created by their trees.

repairs. In fact, the sidewalk at issue here was repaired three days after a complaint was received. CP 45.

Without complaints from the public, reports from the adjacent property owner, or observation by maintenance workers who happened to be in the neighborhood, the only way the City could have discovered the uplift in this case would have been by continuous inspection of its sidewalks. But in Washington there is no common law, statutory, or regulatory requirement that municipalities inspect their sidewalk infrastructure on an ongoing basis. For this reason, such inspection cannot be the measure of ordinary care, and the fact that the City does not inspect its sidewalks is not evidence of the failure to exercise ordinary care.

The Almos argue, however, that the City was under a duty to inspect its sidewalks. Brief of Appellants, p. 9. The only authority cited for that proposition is a comment to WPI 140.02: “Rather than attempting to define constructive notice and thereby unduly confuse the jury, this instruction directly sets forth the time requirement and the duty of a governmental entity to inspect its sidewalks, streets, and roads.” 6A *Washington Practice*, WPI 140.02, Comment, p. 40 (Fifth Edition, 2011

Supplement).³ But the instruction does not *directly* set forth a duty to inspect, despite the Committee's choice of words, and so the comment only makes sense if the duty to inspect is understood to arise *after* the governmental entity acquires notice of an unsafe condition. Certainly, none of the cases cited in the comment even remotely hints at a city's duty of ongoing inspection for hazardous conditions.⁴ Nor do the Almos cite any such case in their brief. As a matter of law, the duty to provide reasonably safe sidewalks does not encompass the duty to proactively inspect.

In the absent of negligence on the part of City workers, the Almos could only have shown that the City breached its duty of ordinary care with evidence that its actual practice was a bad choice among the available alternatives. *See Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d 240 (1997). There, the Supreme Court affirmed the admissibility of evidence of Stanwood's efforts to secure grant funds to raise the level of dikes containing a sewage lagoon, the flooding of which caused the

³ It should be noted that jury instructions in WPIC, and inferentially comments to the instructions, are not binding authority. *State v. Roggenkamp*, 115 Wash. App. 927, 939, 64 P.3d 92 (2003).

⁴ *See Wright v. City of Kennewick*, 62 Wn.2d 163, 381 P.2d 620 (1963); *Nibarger v. City of Seattle*, *supra*; *Skaggs v. General Electric Co.*, 52 Wash.2d 787, 328 P.2d 871 (1958). The City has been unable to discover a duty to inspect in the progeny of any of these cases.

damages alleged. *Id.*, at 733. Rejecting the plaintiffs' argument that such evidence amounted to a "poverty" or "hardship" defense, the court analyzed the reasonableness of the city's conduct in light of the alternatives available to deal with the danger perceived, *i.e.*, unusually heavy flooding. *Id.* These included inaction, immediately raising the level of the dikes, and conducting studies of long-term flood control solutions, studies which were partly funded by grant money. Evidence of Stanwood's efforts to obtain the grant money was relevant to establishing the reasonableness of the latter choice. *Id.*, at 736. In this case, the issue is not the admissibility of evidence of the reasonableness of the City's sidewalk maintenance regime, but the utter *absence* of evidence that such regime is unreasonable.

The Almos contend that "the City has essentially chosen to do nothing with respect to sidewalk hazards beyond responding to specific complaints." Brief of Appellants, p. 16. This misstates the evidence somewhat, since the City also relies on adjacent property owners to comply with the ordinance requiring them to report hazards they discover in public places, and, when funding is available, the City targets for inspection areas with a history of reported problems. CP 40. In any event, the Almos offer no evidence showing that City's actual practice is an unreasonable response to the problem at issue: a sidewalk uplift of less

than once inch. There is no evidence that reliance on citizen complaints and reports from adjacent property owners is ineffective, or is a poor use of available funds and human resources, or in some way fails to comply with recognized standards of infrastructure management. In this case, for example, the sidewalk was repaired three days after the City received notice of the defect, yet no evidence was offered to show that such a response is unacceptably tardy.

Nor, given the limitations of the City's financial and human resources and the size of the sidewalk infrastructure, is there evidence of a more efficient or cost-effective way of dealing with sidewalk uplifts of this kind. The Almos' argument that meter readers should be charged with inspecting sidewalks, that a single employee could inspect the City's 2,000 miles of sidewalk in less than six months, and that the City should print warnings on utility bills to remind property owners to comply with the law is just that: argument. There is no evidence that any of these practices would, compared to the current regime, better effectuate repairs of sidewalk uplifts of less than one inch. In the absence of such evidence, a jury could only speculate that there was a better method of maintaining sidewalk infrastructure than that currently employed by the City. Where the state of the evidence would require a jury to speculate, summary judgment is appropriate. *Miller v. Likins*, 109 Wash.App. 140, 147, 34

P.3d 835 (2001). Given the state of the evidence in this case, the trial court did not err in granting summary judgment.

2. Constructive notice of a sidewalk uplift of less than an inch cannot be imputed to Seattle because appellants offered no substantial evidence of how long the uplift presented an actionable hazard to pedestrians.

The City's duty to maintain its public ways in reasonably safe condition does not mean it must provide absolutely safe sidewalks, for that would impermissibly make the City an insurer of pedestrians' safety. *Hoffstatter v. City of Seattle*, 105 Wash.App. 596, 599-600, 20 P.3d 1003 (2001). Since the City is not required to maintain perfectly flat sidewalks, it follows that a certain amount of uplift may exist before liability can attach in a given case. Since constructive notice "may be inferred from the elapse of time a dangerous condition is permitted to continue," *Nibarger, supra*, at 230, the Almos needed to produce evidence of when the clock started running on the City's presumed awareness of the part of the uplift which represents an *actionable* hazard. They needed to show that some impermissible portion of the uplift existed for a particular period of time, and that the City should have learned of that portion during *that* time.

No such evidence was produced. Mr. Almo, who used the sidewalk often during his daily attendance at the synagogue, was unable to state that he saw any defect before his accident. No complaints from the

congregation, or the public at large, brought City crews to the sidewalk before the accident. The synagogue, the adjacent landowner, never reported the condition of the sidewalk, as required by SMC 15.18.010, before February 22, 2008, the day of Mr. Almo's accident.

The only evidence going to the age of the uplift offered in opposition to the motion for summary judgment was the opinion of appellants' expert, Favero Greenforest. CP 114-131, 145.⁵ However, this opinion lacks factual support, and thus cannot have raised a question of fact for a jury.

A plaintiff opposing summary judgment must produce a quantum of evidence that is sufficient on its face to support a verdict in the plaintiff's favor. This is a requirement of substantial evidence. As the United States Supreme Court has said:

[W]e have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard...the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

⁵ The Declaration of Favero Greenforest appears in the Clerk's Papers at 114-131, with attachments, at 141-42, without attachments, and at 218-35, with attachments. The text of the declaration is identical in all three instances.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *accord*, *Young v. Key Pharmaceuticals, Inc.*, *supra*, 112 Wn.2d at 226. (Summary judgment appropriate where plaintiff lacks evidence to make out a case in chief.) Mr. Greenforest's declaration fails this test because it does not comply with the requirement that expert opinions offered in summary judgment proceedings be supported by the specific facts underlying the opinions. *See Anderson Hay & Grain Co., Inc. v. United Dominion Industries, Inc.*, 119 Wash. App. 249, 259, 76 P.3d 1205 (2003). Without such supporting facts, an expert's opinion cannot create a jury question.

Mr. Greenforest, an arborist, states that the sidewalk uplift was caused by the roots of the nearby trees, and was completed "years before" Mr. Almo's accident. CP 114-15. This opinion is based on Mr. Greenforest's estimate that the trees are 90 to 110 years old, and his contention that their roots would have stopped expanding when they were about 70 years old. CP 114-15. However, Mr. Greenforest does not state that he determined the trees' height or girth, or counted their rings, or that he took any other objective measurements. He makes no mention of how, or whether, the growth of trees is affected by rainfall and temperature, nor of what effect, if any, such factors may have had on these particular trees in light of the local climate history. Yet his declaration contains no

explanation of how the age of a tree can be inferred in the absence of such data. His opinion, implicit in the arithmetic, that the sidewalk uplift has existed for some 20 to 40 years is thus unsupported by specific facts showing how he determined the age of the trees.

Mr. Greenforest also opines that photographs of the edge of the uplifted panel are evidence that the uplift “likely took place years before Larry Almo’s fall.” CP 115. But Mr. Greenforest, whose resume is silent regarding expertise in concrete fabrication, strength of materials, or similar construction-related fields, CP 117-120, does not explain how the edge of a concrete panel uplifted about an inch will look different from one uplifted, say, a quarter of an inch. Without such explanation, his opinion that the age of the entire uplift can be inferred from the appearance of its edge has no factual predicate.

Expert testimony which lacks factual support does not rise to the level of substantial evidence and, on motion for summary judgment, is properly excluded as speculative. *Miller v. Likins, supra*, 109 Wash. App. at 148. Because Mr. Greenforest’s declaration fails to comply with the evidentiary requirements applicable to summary judgment motions, his opinion is not admissible as evidence of the age of the trees, and thus is not evidence that the uplift existed long enough to impart constructive

notice on the City. The trial court properly discounted the declaration in granting the City's motion.⁶

3. In the absence of newly discovered evidence, the trial court did not abuse its discretion in denying appellants' motion for reconsideration.

Motions for reconsideration are addressed to the sound discretion of the trial court, and the court's ruling will not be reversed absent a showing of manifest abuse of discretion. *Wilcox v. Lexington Eye Inst.*, 130 Wash. App. 234, 241, 122 P.3d 729 (2005). An abuse of discretion exists only if no reasonable person would have taken the view the trial court adopted, if the trial court applied the wrong legal standard, or if it relied on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). In this case, the trial court did not abuse its

⁶ The Almos also argue that notice was not required in this case because the City should have anticipated that the tree roots would cause an uplift, and that the failure to do so was a breach of duty. Brief of Appellants, pp. 8-9. They cite no authority supporting this view. On the contrary, the cases are clear that foreseeability is not evidence that a condition will exist, and does not create a duty to prevent the condition. *Laguna v. Washington State Dept. of Transportation*, 146 Wash.App. 260, 265, 192 P.3d 374 (2008). ("There is a difference between liability based on knowledge that a dangerous condition actually exists and knowledge that a dangerous condition might, or even probably will, develop.")

discretion in denying the Almos' motion for reconsideration.⁷

Motions for reconsideration may be granted on one or more of the grounds enumerated at CR 59(a). The Almos did not cite any of these in their motion, but did attach the declaration of Moan Mao, whom they described as "a previously unknown witness." CP 149. The City thus understands the ground for the motion to be that provided by CR 59(a)(4), "newly discovered evidence."

A decision will be vacated on the basis of newly discovered evidence only if the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; or (5) is not merely cumulative or impeaching. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wash. App. 73, 88, 60 P.3d 1245 (2003).⁸ The failure to satisfy *any one* of these conditions will justify denial of the motion. *Id.* Mr. Mao was not a "previously unknown witness," and his testimony was readily available

⁷ Appellate courts will not review a decision unless the claimed error is included in an assignment of error, or clearly disclosed in an associated issue, and supported by argument and citation to authority. *Rhinehart v. Seattle Times*, 59 Wash. App. 332, 336, 798 P.2d 1155 (1990). Appellants neither assign error to the denial of their motion for reconsideration nor discuss it in their brief. The City submits that the trial court's ruling on the motion for reconsideration is not properly before this court.

⁸ Although CR 59(a) refers to "trial," the rule by its terms applies to "any order of the court...by which [a] party was prevented from having a fair trial." CR 59(a)(1).

to the Almos before the hearing of the City's motion for summary judgment.

Mr. Almo identified Mr. Mao in his deposition on April 15, 2011, describing him as an employee of the synagogue in charge of the upkeep of the grounds. CP 29. There is no evidence that Mr. Mao was unavailable to provide a declaration before the court granted summary judgment on June 10, 2011. If evidence is available to a party but not offered until after the opportunity to do so has passed, the party is not entitled to submit the evidence on a motion for reconsideration. *Wagner Dev., Inc. v. Fid. & Deposit Co.*, 95 Wash. App. 896, 907, 977 P.2d 639 (1999). The City raised this objection to the Mao declaration in its opposition to the motion for reconsideration. CP 242. The trial court was well within its discretion to disregard the declaration when ruling on the motion.

Moreover, the Mao declaration fails to comply with the evidentiary requirements applicable to summary judgment proceedings. Under CR 56(e), declarations submitted in support of or in response to a motion for summary judgment must be made on personal knowledge, set forth such facts as would be admissible in evidence, and must affirmatively show that the affiant is competent to testify as to his or her averments. There must be evidence in the declaration or the record as a whole which

rationally supports the declarant's knowledge of facts stated in the declaration. *Citoli v. City of Seattle*, 115 Wash.App. 459, 475, 61 P.3d 1165 (2002). Mr. Mao's declaration fails this test.

Mr. Mao states that he has mowed and edged the grass at the "location where Mr. Almo fell" for more than 20 years. CP 205. The exact location of Mr. Almo's accident is not in dispute, and was marked by Mr. Almo on a photograph during his deposition. CP 17, 20, 28.⁹ That photograph shows several sidewalk panels near the one identified by Mr. Almo, all of which are adjacent to the grass presumably mowed and edged by Mr. Mao. However, the Mao declaration does not refer to this photograph, or to any other evidence which specifically identifies the known location of the accident. Without such foundation, there is nothing in the record that affirmatively shows how Mr. Mao knew that what he calls "[t]he sidewalk panel uplift which tripped Larry Almo ..." is in fact the one that actually did. CP 205. The City objected to the Mao declaration on this ground. CP 240. Since a jury could only speculate that the panel to which Mr. Mao refers is the same one at issue in this case, the declaration is insufficient to defeat summary judgment. *See Marshall v.*

⁹ A color copy of the photograph at CP 20 is attached in the Appendix. The photo marked by Mr. Almo in his deposition was in color, as was the copy attached to the Declaration of Jeffrey Cowan, CP 17-41, filed in support of the City's motion for summary judgment. The photo was taken after the sidewalk had been repaired. CP 17.

Bally's Pacwest, Inc., 94 Wash.App. 372, 381, 972 P.2d 475 (1999). The trial court did not abuse its discretion in denying the Almos' motion for reconsideration.

V. CONCLUSION

Summary judgment motions are tests of evidence. Even considering the facts of this case in the light most favorable to the Almos, there is no evidence that the City breached its duty of ordinary care in the maintenance of its sidewalks, and no admissible evidence of constructive notice of a sidewalk uplift of less than one inch. The trial court did not err in granting summary judgment, and did not abuse its discretion in denying the Almos' motion for reconsideration. The City asks that this court affirm the trial court's rulings in all respects.

Respectfully submitted this 18th day of April, 2012.

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VI. APPENDIX

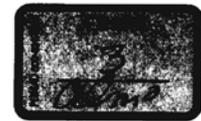
Seattle Municipal Code, Sec. 15.18.010.....A1
CP 20A2

**SMC 15.18.010 Duty to maintain -- Notice of hazardous condition --
Barricading.**

A. The owner of a structure on property adjoining a public place has an obligation to maintain it so that it does not create a hazard to the public using the public place; and, if a hazard to the public should develop, to promptly place barricades in the public place to warn the public of the danger and discourage entry into the area of risk. Upon discovering the hazard, the owner shall immediately inform the Director of Planning and Development, and, as to park drives and boulevards, the Superintendent of Parks and Recreation, and as to other public places, the Director of Transportation.

B. Whenever the Director of Planning and Development finds that a building is unsafe, according to the Building Code (SMC Title 22), or any other applicable ordinance, and a hazard to public safety, health or welfare may exist to members of the public using a public place, then the authorizing official may in his or her discretion immediately barricade the public place or require the owner or occupant of the adjoining property to set up barricades to the extent necessary, so as to prevent public access to such area in the interest of public safety. If the City incurs an expense in erecting or maintaining barricades, the authorizing official shall bill the owner or occupant the cost thereof together with an administrative charge equal to fifteen percent (15%) of the amounts expended.

The Director of Planning and Development forthwith shall notify the owner or his or her agent of such hazardous condition and to correct this condition within ten (10) days from the date of notice thereof.



CERTIFICATE OF SERVICE

Susan E. Williams certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On April 18, 2012, I requested ABC-Legal Messengers, Inc., to deliver, by April 18, 2012, a copy of the foregoing Brief of Respondent City of Seattle upon the following counsel:

Carl A. Taylor Lopez, WSBA #6215
Lopez & Fantel, Inc., P.S.
2292 W Commodore Way, Suite 200
Seattle, WA 98199

DATED this 18th day of April, 2012.


SUSAN E. WILLIAMS