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NO. 71022-2-1

(King County Superior Court No. 12-2-03756-6 SEA)

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

MIGUEL GAONA

Appellant,

v.

GLEN ACRES GOLF & COUNTRY

CLUB and GLEN ACRES

HOMEOWNER'S ASSOCIATION, INC.

Respondent.

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STATE OF WASHINGTON
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BRIEF OF APPELLANT MIGUEL GAONA

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A. ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it granted the defendants' motion to dismiss the plaintiff's claims against the defendants.

Issues Related to Assignment of Error

a.) Does a commercial owner meet its legal obligation to exercise ordinary care to maintain its property in a reasonably safe condition for business invitees by casual inspection for disease or damage as opposed to an inspection by a consulting arborist of trees located in proximity to residential apartments on said property or does such a determination depend on the circumstances of the particular case?

b.) Does an expert's "more probable than not" opinion as to the probable condition of a tree prior to his inspection and adequacy of inspection establish questions of fact?

c.) Does the question of a witnesses' credibility establish a question of fact when his competency as to specific observations is questioned (Bill Placek's observations of disease and damage to the tree in question when his testimony is inconsistent with those of other observations about trees in the stand)?

d.) Does a material question of fact exist as to the defendants' actual or constructive knowledge that the tree in question was potentially hazardous?

B. STATEMENT OF THE CASE

On September 2, 2009, a Willow tree on the Glen Acres premises struck plaintiff Miguel Gaona on the head while he was mowing grass causing a head injury, cervical strain, left sided lumbar herniation and retroperitoneal hemorrhage that necessitated surgery. At the time of the incident he was acting within the scope of his employment with Bill's Maintenance Company, a gardening and landscaping company that provided gardening maintenance for the Glen Acre complex.

Glen Acres is comprised of 225 condominium units and an adjacent golf course. It retained Bill's Maintenance Company to oversee maintenance of the complex and provide landscaping and tree care/inspection.

Miguel Gaona filed suit against the defendants on January 31, 2012. Clerk's Papers (hereinafter "CP") 1-4. The defendants scheduled a Motion for Summary Judgment on September 13, 2013. CP 15-18. The defendants argued that they did not have either actual or constructive knowledge of the tree hazard and had conducted reasonable, albeit it, casual inspections by untrained personnel of the trees located on their property. In support of this argument, they pointed out that no one had specifically claimed to see signs of disease or defect in the subject tree prior to its falling on the plaintiff. Defendants also argued that the testimony of plaintiff's expert arborist concerning the condition of the subject tree at the time of its falling was speculative and that his testimony as to the standard for inspecting trees for hazards and defects was irrelevant because the question of what was reasonably known about the tree's health came within the purview of a

layman's knowledge. That is, the law did not require inspections by personnel with special training or knowledge concerning indications of tree disease/defect. The plaintiff argued in opposition that its expert's testimony as to the tree's condition at the time of its falling and before established a question of fact. Plaintiff further argued that a meaningful inspection for hazards/defects required consultation with personnel established as knowledgeable in these issues.

The trial court granted the defendants' motion to dismiss and the plaintiff filed this appeal. CP 25.

C. SUMMARY OF ARGUMENT

The trial court's decision to dismiss this case is contrary to the intent of of the law regarding a landowner's duty to business invitees as established by case law, the Restatement (Second) of Torts (1965) and public policy. See also *Coleman v. Ernst Home Center*, 70 Wn.App. 213, 853 P.2d 473(1993); *Morton v. Lee*, 75 Wn.2d 393, 397-98, 450 P.2d 957(1969). In applying the duty of care to business invitees, Washington courts have uniformly recognized the necessity for adequate inspections in the exercise of reasonable and prudent care particularly in light of the nature of the risk presented. *Coleman* and *Morton*, *supra*. Whether or not such inspections are adequate in the light of the risk presented is a jury question. *Morton*, *supra*; *Messina v. Rhodes Co.*, 67 Wn.2d 19, 406 P.2d 312 (1965). Reasonable minds could differ as to whether the landowner in this case made appropriate inspections under the circumstances of this case.

Further, credibility issues inherent in this case preclude summary judgment dismissal. An issue of credibility is present if there is contradictory

evidence or if the movant's evidence is impeached. Amend v. Bell, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963). There is no support in the law for the proposition that an expert's testimony cannot establish a question of fact. On the contrary, expert opinion testimony is often at the heart of litigated disputes.

D. ARGUMENT

The trial court erred in dismissing plaintiff's claim because material issues of fact were presented as to whether the defendants exercised adequate measures to protect its business invitees, particularly with regard to the adequacy of the inspections performed and the condition of the falling tree that hit the plaintiff.

1. Case Law Establishes the Necessity for the Exercise of Reasonable Care in Maintaining the Landowner's Property in a Reasonably Safe Condition.

An owner of a premises is liable for any physical injuries to its business invitees caused by a condition on the premises if the owner:

- (a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such business invitee;
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
- (c) fails to exercise ordinary care to protect them against the danger.

Restatement (Second) of Torts, Section 343 and Washington Pattern Jury Instructions 120.7.

The owner has an affirmative duty to inspect to discover possibly dangerous conditions of which he does not know and take reasonable precautions to protect the invitee from dangers that are foreseeable from use of the property. *Smith v. Manning's, Inc.*, 13 Wn.573, 580, 126 P.2d 44 (1942).

A business's constructive notice of a dangerous condition can be based on the owner's failure to conduct adequate and periodic inspections required in the exercise of reasonable and prudent care given the foreseeability of the risk. The liability depends on the circumstances. *Pimental v. Roundup Co.*, 100 Wn.2d 39, 49, 666 P.2d 888 (1983).

2. Adequacy is a Jury Question.

The adequacy of a landowner's inspections for dangerous conditions is a jury question. *Coleman*, 70 Wn.App. at 217; *Morton*, 76 Wn.2d at 397-398.

No element of discretion is vested in the trial court in ruling upon the motion. If there are justifiable inferences from the evidence upon which reasonable minds might reach conclusions that would sustain a verdict, then the question is for the jury, not for the court. The motion may be granted only if it can properly be said as a matter of law that there is no evidence or reasonable inference therefrom to sustain a verdict for the nonmoving party.

Harrison v. Whitt, 40 Wn.App. 175, 178-79, 698 P.2d 87, review denied, 104 Wn.2d 1009 (1985).

There is no support in the law for the argument that the issue of adequacy should be decided on any other basis than what was reasonable under the circumstances of this particular case – a jury question.

3. Baker's Testimony and Opinions Explicitly Contradict Placek's Testimony Regarding the Condition of the Subject Tree at the Time It Fell on Plaintiff and As Such Present Material Issues of Fact.

Scott Baker, a licensed arborist, has given evidence on behalf of the plaintiff that the condition of the tree that fell on the plaintiff would have shown specific indications of failure, decay, and instability including a noticeable lean of the stump to the north, significant die-back in the crown of the tree, and hollowness at the trunk flare. He further gave evidence that these conditions would have been present for a sufficient period of time prior to the tree's failure to give notice to the defendants and would have been obvious with a proper tree inspection. CP 21.

On the other hand, the defendants' maintenance man, Bill Placek, gave evidence that he never observed disease in the tree. CP 17.

This conflict in evidence clearly presents material issues of fact as to the condition of the tree and the adequacy of the inspections.

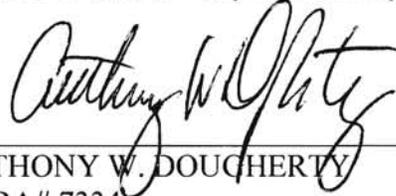
4. There is No Legal Support for the Argument that a Qualified Expert cannot give Opinion Evidence that Establishes Material Issues of Fact.

An otherwise qualified expert witness such as Scott Baker is competent to give evidence based on his expert opinions that establish material issues of fact. The fact that there is contradictory evidence presented by defendants' maintenance witness only serves to highlight the presence of material issues. One could infer that the maintenance witnessed observations lacked credibility in view of their casual nature and his lack of training.

E. Conclusion

For the foregoing reasons, plaintiff requests that this court reverse the trial court's order and reinstate this lawsuit.

RESPECTFULLY SUBMITTED this 17th day of February, 2014.

A handwritten signature in black ink, appearing to read "Anthony W. Dougherty". The signature is written in a cursive style with a large, looping initial "A".

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