

No. 71117-2-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JOSEPHINE JOHNSON,

Appellant,

v.

CITY OF EVERETT, DONALD and PATRICIA KRASSIN,

Respondents.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

A. INTRODUCTION

This is a simple negligence case in which the City of Everett had a duty to exercise reasonable care to maintain safe sidewalks free of defects and breached that duty by leaving a dangerous defect in place despite the fact that it had inspected the area surrounding the defect on numerous occasions. As a result, Appellant Josephine Johnson fell and suffered injuries. Yet the trial court granted summary judgment dismissing Johnson's claim, concluding as a matter of law and undisputed fact, the City could not have had notice of the defect and therefore had no duty to repair it. The dismissal should be reversed and Johnson's action should proceed to trial.

B. ASSIGNMENTS OF ERROR

The trial court erred by granting Respondent City of Everett's motion for summary judgment when there were issues of material fact as to its notice of the defect in its sidewalk, whether it was open and obvious, and whether the City had a duty to discover and repair it.

Issue Pertaining to Assignment of Error

In a "trip and fall" negligence action by a pedestrian against a city, is summary judgment improperly granted when there are material disputed facts in the record as to whether the City had notice of the defective

sidewalk, whether the defect was open and obvious, and whether the City had a duty? (De novo review.)

C. STATEMENT OF THE CASE

This action arises out of a trip and fall incident that occurred on May 9, 2009, in Everett, Washington. CP 238. Josephine Johnson was walking with a friend on a public sidewalk along Broadway Avenue when she tripped and fell on an unrepaired depression in the sidewalk. CP 68; 73; 74; 207; 238. There were no substances or debris on the sidewalk in the area around where she fell to alert her to any potential hazards. CP 84. Johnson was unfamiliar with this area, but she was watching where she was walking prior to the fall. CP 205-06.

Certain roads and sidewalks located within the City of Everett, including this particular portion of sidewalk, are maintained by the City's Public Works Department. CP 38. The City itself has no proactive program to inspect, maintain or repair sidewalks. CP 38-39; 40-42. Rather, the City only responds to complaints regarding unsafe sidewalks. CP 38-39; 40-42.

In the 10 years before this incident, the City received no less than 14 service requests to either repair or clean the area directly surrounding the sidewalk in which Johnson fell. CP 50-65. One of the City's own employees, Howard Hansen, believed the sidewalk defect that caused

Johnson's fall rendered the sidewalk unfit or unsafe for public travel, and ordered its repair. CP 39.

Johnson filed this action on May 1, 2012. CP 234-240. The City moved for summary judgment, arguing it had no duty to Johnson because it did not have notice of the defect in the sidewalk before her fall. CP 188-93. It further argued that Johnson's case should be barred because the defect in the sidewalk was open and obvious. CP 128-35.

In addition to the above evidence, Johnson presented the testimony of certified safety and human factors expert, Joellen Gill. Ms. Gill opined this defect substantially violated the standards under the Washington State Building Code and the federal accessibility standards promulgated under the Americans with Disability Act (28 C.F.R. Part 36.403, Appendix A - 4.3.1, 4.3.8 and Figure 7). CP 86-99. The City did not present any expert testimony, making Ms. Gill's opinion undisputed.

The trial court granted summary judgment to the City and dismissed Johnson's action on October 16, 2013. CP 1-2. The court stated its dismissal was based on its determination that no reasonable person could possibly conclude the City knew or should have known of the dangerous sidewalk condition. Johnson timely appealed.

D. SUMMARY OF ARGUMENTS

The trial court erred when it held no reasonable person could possibly conclude the City knew or should have known of the dangerous sidewalk condition. The record demonstrates genuine issues of material fact as to whether the City had notice of the defective sidewalk when it cleaned and/or inspected the area on no less than 14 occasions, its employee believed the area was dangerous and ordered its repair, the defect was a depression, a safety and human factors expert's undisputed testimony showed the sidewalk was unsafe and in violation of standards, and the defect was repaired shortly after Johnson's fall. In fact, the record supports a determination that the City owed a duty as a matter of law. The dismissal was error and should be reversed so that Johnson's claim can proceed to trial.

E. ARGUMENTS

1. Summary Judgment Standard

This Court reviews summary judgment motions de novo, engaging in the same inquiry as the trial court. "The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 752, 310 P.3d 1275 (2013) (internal quotations omitted).

2. Summary Judgment Is Improper Where Duty Depends On Disputed Facts.

“[S]ummary judgment is inappropriate where the existence of a legal duty depends on disputed material facts.” *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013) (citing *Sjogren v. Props. of Pac. Nw., LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003)); *Millson v. City of Lynden*, 174 Wn. App. 303, 312, 298 P.3d 141 (2013). See also *Washburn v. City of Federal Way*, 169 Wn. App. 588, 610-11, 283 P.3d 567 (2012) (“duty arises from the facts presented.”), *aff’d*, 178 Wn.2d 732 (2013). Here, the existence of the City’s duty depends on vigorously disputed material facts regarding whether the City had constructive notice of the defect, given its viewing the area numerous times, and whether the defect was “open and obvious”. In contrast, Johnson’s expert’s testimony that the sidewalk defect was unsafe and violated standards is undisputed.

In spite of these disputed material facts, the superior court dismissed Johnson’s claims based on the court’s perception that no reasonable person could possibly conclude the City knew or should have known of the dangerous sidewalk condition. In reaching this conclusion, the court ignored the facts showing the City had viewed the sidewalk no less than 14 times over the prior 10 years, the sidewalk was along a major roadway in the City of Everett, the defect was repaired shortly after

Johnson's fall, the City did not have a proactive safety program, and the hazardous condition was not the result of an acute failure or sudden onset. The superior court failed to view the inferences in Johnson's favor, as it was required to do. *Afoa*, 176 Wn.2d at 466 ("We consider all disputed facts in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion.")

In *Washburn*, this Court noted that to determine whether a defendant owes a duty to the plaintiff, appellate courts have frequently reviewed whether sufficient evidence supports a finding that the alleged duty was owed in the particular circumstances of the case.¹ Thus, a challenge to whether the defendant owes a duty to a plaintiff sometimes requires a determination whether facts can be proved that give rise to the alleged duty. In such cases, as here, the issue of duty does not present a pure question of law. *Washburn*, at 610-11.² The court here improperly resolved disputed facts to determine the City had no duty.

¹*Washburn*, 169 Wn. App. at 610-11 (citing *Munich v. Skagit Emergency Commc'ns Ctr.*, 161 W.App. 116, 121, 250 P.3d 491, *aff'd*, 175 Wn.2d 871 (2012); *Torres v. City of Anacortes*, 97 Wn.App. 64, 75, 981 P.2d 891 (1999); *Yankee v. APV North America, Inc.*, 164 Wn.App. 1, 3-10, 262 P.3d 515 (2011) ("there is insufficient evidence to create a material issue of fact that APV had a duty to warn of asbestos exposure"); *Borden v. City of Olympia*, 113 Wn.App. 359, 370, 53 P.3d 1020 (2002) ("These facts are sufficient to support a finding that the City actively participated in the 1995 project, and, if such a finding is made, that the City owed a duty of due care.").

²"Courts overwhelmingly recognize that foreseeability is not itself sufficient to create a duty and that a variety of other considerations come into play." Benjamin C.

3. The City Has A Duty Of Reasonable Care.

Municipalities have a duty to exercise reasonable care to keep their public roadways and sidewalks in a condition that is reasonably safe for ordinary travel. *Millson*, 174 Wn. App. at 309 (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)). A test that is sometimes applied to determine whether a city has performed its duty is whether a reasonably cautious man, having the duty to preserve and repair the sidewalks, would or would not consider a particular defect as one where pedestrians might be injured. *Id.* at 310 (citing *Johnson v. City of Ilwaco*, 38 Wn.2d 408, 414, 229 P.2d 878 (1951)).

The Washington Supreme Court has made clear that a city is not relieved of its duty to citizens even where a defect is open and obvious. *Millson*, at 310. In *Blasick v. City of Yakima*, 45 Wn.2d 309, 313, 274 P.2d 122 (1954), the City urged “that the injured pedestrian ‘was not looking where she was walking,’ and that the ‘depression was plainly visible, open, obvious and apparent.’” *Millson*, at 310 (quoting *Blasick*, at 313). The Court rejected this argument. *Id.* If there was a question as to

Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 Wake Forest L. Rev. 1247, 1275 (2009).

the open and obvious nature of a sidewalk defect, that should be presented to the jury. *Id.* at 311 (quoting *Blasick*, at 313-14).

In *Millson*, the plaintiff had walked the area at issue before the fall and had noticed defects in the sidewalk. *Id.* at 307. As the plaintiff was walking, she became momentarily distracted and tripped over a lift in the sidewalk that was 1.5 to 2 inches high. *Id.* at 307–08. The City moved for summary judgment, arguing it did not owe the plaintiff a duty because the sidewalk defect was open and obvious and known to her. *Id.* at 308. The Court concluded there was arguably a dispute as to whether the defect that caused the plaintiff’s injury was “open and obvious” and whether the plaintiff had knowledge of its danger, and thus reasonable minds could differ as to the City’s duty and consequent negligence. *Id.* at 313. The Court therefore held that summary judgment was improper. *Id.*

Similarly, in the present case, Johnson was not familiar with the area. CP 205. She was watching where she was walking before her fall. CP 206. The cause of her fall was a depression in the sidewalk, rather than a rise. CP 207. Further, one of the City’s own employees, Howard Hansen, believed the sidewalk defect that caused Johnson’s fall rendered the sidewalk unfit or unsafe for public travel, and ordered the repair of the sidewalk. CP 39.

Johnson’s certified safety and human factors expert, Joellen Gill, opined this defect substantially violated the standards under the Washington

State Building Code and the federal accessibility standards promulgated under the Americans with Disability Act (28 C.F.R. Part 36.403, Appendix A - 4.3.1, 4.3.8 and Figure 7). CP 86-99. While those standards are not directly applicable to a public sidewalk, they are evidence of a reasonable standard of care that may be considered. *Robertson v. Burlington Northern*, 32 F.3d 408 (9th Cir. 1994) (OSHA noise standards may be considered as evidence of a reasonable standard of care in lawsuit brought by railroad worker against his employer for personal injuries due to industrial noise exposure, even though OSHA standards do not apply to the railroad industry).

As this Court held in *Millson*, here too, there is a dispute as to the “open and obvious” nature of the defect, and reasonable minds could differ as to the City's duty and consequent negligence. Summary judgment was improper.

4. Constructive Notice is a Question of Fact.

Constructive notice of an unsafe condition may be imputed to a municipality if the defective condition existed for such a period of time that the municipality, through the exercise of ordinary care and diligence, must have known of its existence, and could have guarded the public against it and failed to do so. *Skaggs v. Gen. Elec. Co.*, 52 Wn.2d 787, 790, 328 P.2d 871 (1958). Whether a defendant had constructive notice of

a condition is generally a question of fact for the jury. *Morton v. Lee*. 75 Wn.2d 393, 397, 450 P.2d 957 (1969).

The period of time that is sufficient to impute constructive notice “is determinable largely from the circumstances of each particular case.” *Skaggs*, 52 Wn.2d at 789. See also *Hartley v. Tacoma Sch. Dist. No. 10*, 56 Wn.2d 600, 602-03, 354 P.2d 897 (1960) (concluding that the jury was justified in finding that almost one week was sufficient time for the city to have constructive notice of an icy and snowy sidewalk). The Washington Supreme Court has noted that the location of the condition and the nature of the condition may also affect this period of time. See, e.g., *Elster v. City of Seattle*, 18 Wash. 304, 308, 51 P. 394 (1897).

In *Skaggs*, 52 Wn.2d 787, 788, 328 P.2d 871 (1958), the jury considered whether General Electric had constructive notice of a stop sign that was bent over a sidewalk. In determining whether the trial court properly submitted the notice issue to the jury, the Court looked at the specific circumstances in that case. *Id.* at 790. It considered the fact that the stop sign was on “one of the busiest streets in Richland, which has approximately twenty-seven thousand inhabitants, and that the obstruction existed from nine o'clock a.m. until four o'clock p.m.” *Id.* Given these circumstances, the Court concluded that this question of fact was properly submitted to the jury. *Id.*

Here, the defect was on a sidewalk along a main roadway in the City of Everett. The testimony of safety and human factors expert Joellen Gill establishes the condition of the sidewalk was not due to a sudden onset or acute failure. Rather, it developed over many years. CP 86-99. Moreover, in the ten years preceding Johnson's fall, the City was in the same area inspecting other complaints and cleaning the area. Hence, the City had years to identify the defective sidewalk and repair it. It failed to do so because it had no maintenance program for the inspection of sidewalks. This is a question of fact for the jury, and reasonable minds could differ whether the City had constructive notice. Johnson does not have to prove the City was negligent in failing to discover the condition, but she must prove the condition existed for a sufficient period of time that the City should have known of its existence if it was exercising ordinary care and diligence.

5. Negligence is a Question of Fact.

Negligence itself is generally a question of fact for the jury, and should be decided as a matter of law only in the clearest of cases and when reasonable minds could not have differed in their interpretation of the facts. *Millson*, 174 Wn. App. at 312. On summary judgment, the Court considers all disputed facts in the light most favorable to the nonmoving party – Josephine Johnson. *E.g.*, *Afoa*, at 466. As in *Millson*, in the

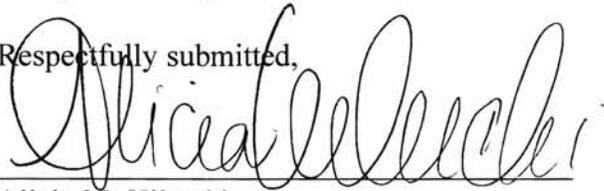
present case, reasonable minds could easily differ as to whether or not the sidewalk defect was open and obvious and whether or not the City of Everett had constructive notice of the defect prior to Johnson's fall. The trial court erred in resolving these disputed questions of fact as a matter of law, and dismissing Johnson's claim.

F. CONCLUSION

The record demonstrates material factual disputes as to whether the City knew from its many reviews of the area at issue and repeated reports of the defect, including its own employee's, that the sidewalk where Johnson fell was dangerous and needed to be repaired. There are material questions of fact as to whether the depression was open and obvious. The superior court improperly resolved these disputed facts to conclude the City had no duty as a matter of law. Johnson respectfully requests that this Court reverse the trial court's dismissal of her claim and allow her action to proceed to trial.

DATED this 23rd day of January 2014.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Alicia M. Kikuchi". The signature is written in black ink and is positioned above a horizontal line.

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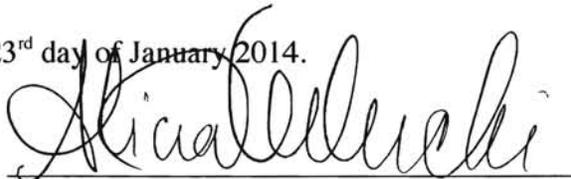
CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Brief of Appellant** by hand delivery a full, true, and correct copy thereof on the date set forth below.

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DATED this 23rd day of January 2014.

A handwritten signature in cursive script, reading "Alicia M. Kikuchi", written over a horizontal line.

Alicia M. Kikuchi