

NO. 71117-2-I

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

JOSEPHINE JOHNSON, an individual,

Appellant,

vs.

CITY OF EVERETT,

Respondent.

BRIEF OF RESPONDENT

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A. INTRODUCTION

The City of Everett (the “City”) maintains its 739 miles of sidewalks in a reasonably safe manner and is not an insurer of those who use its sidewalks. Under settled Washington law, the City only has a duty to protect a pedestrian from a sidewalk defect that it did not create if the City (1) had actual or constructive notice of a hazardous condition and (2) a reasonable opportunity to remedy that hazardous condition. The Plaintiff, Josephine Johnson (“Johnson” or the “Plaintiff”), has never alleged that the City created the alleged defect at issue in this case or that the City had actual notice of that alleged defect. Instead, Johnson’s entire claim rests on her assertion that the City had “constructive notice.” But Johnson failed to present any evidence, even when that evidence and all reasonable inferences are construed in her favor, which creates a material issue of fact as to the City’s lack of constructive notice. Johnson’s failure of proof on this essential element therefore justified the entry of summary judgment in favor of the City.

On appeal, Johnson attempts to create issues of material fact as to the City’s lack of constructive notice by relying on inadmissible hearsay of an unqualified expert. But unsworn testimony by an expert outside of that expert’s area of expertise cannot create a question of fact to defeat summary judgment. Even if the evidence is not disregarded, as it must be,

the speculative statements do not demonstrate a question of fact and cannot be used to defeat summary judgment. Because the City did not have constructive notice of the alleged defect as a matter of law, the trial court should be affirmed.

B. RESTATEMENT OF ISSUES RELATED TO MS. JOHNSON' S ASSIGNMENTS OF ERROR

In this case, Johnson is attempting to hold the City liable for an alleged defect in a City sidewalk that the City did not create and has alleged that the City had constructive, but not actual, notice. Johnson has failed to present sufficient evidence establishing that a hazardous condition existed or that the City should have discovered the alleged defect and has not presented any admissible evidence regarding how long the alleged defect existed prior to Johnson's accident. Where the Plaintiff failed to present sufficient evidence to establish a question of fact regarding the City's lack of constructive notice by wholly failing to present admissible evidence on an essential element of constructive notice, is summary judgment appropriate?

C. ADDITIONAL ASSIGNMENT OF ERROR

In opposition to the City’s motion for summary judgment, Johnson’s counsel filed a declaration attaching an unsworn letter of Joellen Gill. The City moved to strike the letter as inadmissible.¹ To the extent that the trial court considered the letter as part of its summary judgment ruling, the trial court erred because the letter was unsworn, making it inadmissible hearsay, lacked a factual basis, and contained statements outside of the expert’s expertise.

Issue Pertaining to Assignment of Error

At summary judgment, where the trial court may only consider admissible evidence, did the trial court err in considering a letter containing statements that lacked a factual basis and were outside of the purported expertise where the letter was unsworn and attached to an attorney’s declaration, thereby making it inadmissible hearsay?

D. STATEMENT OF THE CASE

Johnson sued the City, alleging that she fell on a City sidewalk abutting property owned by the Krassin Defendants. CP 237. The City moved for summary judgment on the basis that it did not create the alleged defect and did not have notice of the alleged defect prior to Johnson’s fall.

¹ In the context of this appeal, the City’s Motion to Strike is better considered an objection to the evidence.

CP 191–92. The City established that it lacked actual notice of the alleged defect prior to Johnson’s accident through the uncontested Declaration of James Roy Harris. CP 166–68.

Conceding the lack of actual notice, Johnson’s theory in response to the City’s summary judgment motion was that sufficient evidence existed to create a question of fact as to whether the City could be charged with constructive notice. Johnson argued that that the alleged defect existed for such a period of time that the City, in the exercise of ordinary care, must have known of its existence. CP 121–22. However, Johnson did not know when the alleged defect arose and did not present any direct evidence of when it arose. CP 82. Rather, Plaintiff asserted only that “the testimony through Human Factors and Safety 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 123. The “testimony” of Joellen Gill consisted of a statement Gill made in an unsworn letter which was attached to the declaration of Johnson’s attorney. CP 31–32, 90–97. Further, nothing in the record demonstrates that Gill is qualified to provide expert testimony on the design, construction, or maintenance of sidewalks.

Accordingly, in its Reply Brief, the City objected to, by moving to strike, the Gill letter on various bases. CP 10–15. At the summary

judgment hearing, the trial court verbally denied the City's request to strike the Gill letter. However, the trial court's verbal ruling and written order did not make clear whether the trial court considered the Gill letter or properly disregarded it as inadmissible evidence.

The trial court found that Johnson failed to provide evidence of how long the alleged defect existed, precluded finding constructive notice. Because the City did not owe Ms. Johnson a duty to protect her from unknown defects, the trial court granted the City summary judgment dismissal. CP 3. The Court also granted the Krassin Defendants' motion for summary judgment. *Id.* Johnson has only appealed the summary judgment dismissal of her claims against the City.

E. SUMMARY OF ARGUMENTS

In a trip and fall case such as this, where the City did not create the alleged defect, the City's duty of care is predicated upon the City having (1) notice of a hazardous condition, and (2) a reasonable opportunity to correct the hazardous condition. Johnson alleged that the City had constructive notice, not actual notice, of the defect. Constructive notice requires that the unsafe condition "existed for a sufficient length of time

and under circumstances that” the City, through exercise of ordinary care should have known of its existence.²

The City affirmatively showed that it did not have actual notice of the alleged defect. Johnson failed to present admissible evidence creating a question of fact as to whether the alleged defect was hazardous, whether the City had a reasonable opportunity to correct the alleged defect, and most importantly how long the alleged defect existed. The trial court correctly ruled, as a matter of law, that the City could not have had constructive notice of the alleged defect and therefore owed Johnson no duty to protect her from an unknown hazard.

On appeal Johnson points to speculative allegations in the record and alleges that an unsworn letter from a human factors expert created issues of fact as to whether the alleged defect was a hazardous condition and as to how long the alleged defect existed. But, the expert’s opinions lack a factual basis and fall outside of the expert’s expertise. Even so, the speculative and conclusory allegations relied upon are too indefinite to create a question of fact as to the City’s lack of constructive notice. The Court should reject Johnson’s appeal and affirm the trial court’s summary judgment dismissal.

² 6A Washington Practice: Washington Pattern Jury Instructions: Civil 140.02 (6th ed. 2012) (hereinafter “WPI”); *see also* Brief of Appellant, p.12; *Skaggs v. General Elec. Co.*, 52 Wn.2d 787, 328 P.2d 871 (1958).

F. ARGUMENTS

1. Standard of Review.

This Court reviews the entry of summary judgment de novo and therefore applies the same standards applied by the trial court.³ This includes de novo review of whether the trial court properly considered only admissible evidence when making its ruling.⁴

Summary judgment is a procedure for testing the existence of a party's evidence⁵ and a defendant can seek summary judgment on the basis that the plaintiff lacks competent evidence to support her claim.⁶ The plaintiff then must present specific facts, supported by admissible evidence, to show a genuine issue for trial.⁷ The plaintiff cannot rely on mere allegations, conclusory assertions, or inadmissible evidence to meet this burden.⁸ If "the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court

³ *Millson v. City of Lynden*, 174 Wn. App. 303, 317, 298 P.3d 141 (2013).

⁴ *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2007), *as amended*, ("like the trial court, in deciding whether summary judgment was proper, we consider only admissible evidence"). *See also Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008), *as amended*, ("Ordinarily, evidentiary rulings are reviewed for abuse of discretion. However, '[t]he de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.'") (citations omitted)).

⁵ *Landberg v. Carlson*, 108 Wn. App. 749, 753, 33 P.3d 406 (2001).

⁶ *Hymas v. UAP Distribution, Inc.*, 167 Wn. App. 136, 150, 272 P.3d 889 (2012).

⁷ *Ballard v. Popp*, 142 Wn. App. 307, 313, 174 P.3d 681 (2007).

⁸ *Miller v. Linkins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (citing *Ruff v. King County*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995)); *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999).

should grant the motion.”⁹ In such a situation, the plaintiff has failed to show a genuine issue of material fact on an essential element and therefore the defendant is entitled to a judgment as a matter of law.¹⁰

When a plaintiff does not offer any admissible evidence showing how long an allegedly hazardous condition has existed, the court may resolve the issue of constructive notice as a matter of law.¹¹ Based on this standard, the trial court properly granted the City summary judgment and dismissed Johnson’s complaint.

2. The City did not owe Ms. Johnson a duty to protect her from an unknown hazard.

The City is only required to keep its sidewalks in a reasonably safe manner and is not an insurer of those who use its sidewalks. Johnson has never alleged that the City or its employees in any manner created the alleged defect at issue in this case. CP 192, 236–240. Nor does Johnson allege that the City or its employees had actual notice of the alleged defect prior to Johnson’s accident. Brief of Appellant, p.8 (“the existence of the City’s duty depends on . . . whether the City had constructive notice of the defect”). But Johnson has failed to demonstrate that a question of fact

⁹ *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

¹⁰ CR 56(c); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

¹¹ *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (noting that the existence of “duty is a question of law and that even factual questions, where reasonably minds cannot differ, may be “determined as a matter of law”) (citations omitted).

exists as to whether the City had constructive notice of the alleged defect prior to Johnson's accident, precluding City liability.

a. The City could not owe Ms. Johnson a duty to repair the defect without a showing that the City had constructive notice of the alleged defect.

Well settled law provides that where a city did not create the alleged sidewalk defect, the city only has a duty of care if the city "had notice of the condition and . . . a reasonable opportunity to correct the condition." WPI 140.02.¹² Notice of the condition can be actual or constructive.¹³ However, some form of "notice of a dangerous condition is an essential element of the [City's] duty of reasonable care."¹⁴

Johnson concedes that to show constructive notice she must establish that "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."¹⁵ "The decisive issues . . . are [1] the length of time the condition is present and [2] the opportunity for

¹² WPI 140.02. See also *Millson*, 174 Wn. App. at 309–10 (citing *Wright v. City of Kennewick*, 62 Wn.2d 163, 167, 381 P.2d 620 (1963)); *Nguyen v. City of Seattle*, Slip Op. No. 69263-1-1, p.8 (Jan. 27, 2014) (citing *Laguna v. Wash. State Dep't Transp.*, 146 Wn. App. 260, 263, 192 P.3d 374 (2008)) (citation omitted).

¹³ *Nguyen*, p.8–9 (citing *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996)).

¹⁴ *Nguyen*, p.9.

¹⁵ Brief of Appellant, p.12 (emphasis added). See also, WPI 140.02; *Skaggs*, 52 Wn.2d 787; *Nibarger v. City of Seattle*, 53 Wn.2d 228, 230, 332 P.2d 463 (1958) (citing *Holland v. City of Auburn*, 161 Wn. 594, 297 P. 769 (1931)); *Nguyen*, p.9 (citing *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994)).

discovery under the circumstances proved.”¹⁶ “The permissible period of time for the discovery and removal or warning of the dangerous condition is measured by the varying circumstances of each case.”¹⁷

b. Ms. Johnson cannot show that the City had constructive notice of the alleged defect without showing how long the allegedly hazardous condition existed.

The time necessary to establish constructive notice will change depending on the nature of the alleged defect and the surrounding circumstances, but for even the most obvious defect, some passage of time is needed to say that a city should have discovered the defect in *that* time period.¹⁸ When a plaintiff fails to present evidence that creates a question of fact regarding notice of a hazardous condition, the suit should be dismissed on summary judgment.¹⁹ Here, summary judgment was proper because Johnson failed to present competent evidence regarding the extent of the alleged defect or whether the City had an opportunity to correct the

¹⁶ *Morton v. Lee*, 75 Wn.2d 393, 397, 450 P.2d 957 (1969) (citing *Deagle v. Great Atlantic & Pacific Tea Co.*, 343 Mass. 263, 178 N.E.2d 286 (1961) (noting that the actual length of time a defect existed may be of less importance when viewed in light of the other circumstances)).

¹⁷ *Morton* 75 Wn.2d at 397.

¹⁸ Compare *Morton*, 75 Wn.2d 393 (finding that a hazard existing for five minutes could support constructive notice under the circumstances) with *Coleman v. Ernst Home Center, Inc.*, 70 Wn. App. 213, 853 P.2d 473 (1993) (directed verdict was appropriate where the plaintiff failed “to present any evidence at all concerning how long the dangerous condition existed” and therefore could not establish constructive notice) and *Iwai*, 129 Wn.2d 84 (where there was “no evidence giving any indication of how long the particular icy condition had existed,” the plaintiffs failed to demonstrate constructive notice, but other exceptions may have been applicable).

¹⁹ *Nibarger*, 53 Wn.2d 228.

alleged defect, but even more importantly, failed to show the duration over which the alleged defect existed.

A long string of premises liability cases in Washington establish that constructive notice cannot be established without some evidence as to how long the specific hazardous condition existed.²⁰

In *Coleman v. Ernst Home Center, Inc.*,²¹ the plaintiff tripped due to missing sections of carpet at the entry way of a store.²² There was evidence that the store was aware of other instances where portions of the carpet had become loose or missing and that the store did inspections every day at nine a.m. Moreover, there was a cashier's station eight to ten feet away from the missing carpet. Nevertheless, the evidence showed that no employees had seen the defect prior to the accident.²³ This Court explained that while circumstantial evidence may be used to prove the duration of a defect, speculative inferences without more did not create a question of fact.²⁴ Because there was "no clear evidence concerning what caused the [defect] or as to how long the [defect] had been present before"

²⁰ While these premises liability cases present considerations inapplicable to sidewalk cases based on the greater duty a land owner owes to an invitee and possible alternative means of holding a property owner liable without constructive notice, they remain instructive on constructive notice.

²¹ 70 Wn. App. 213, 853 P.2d 473 (1993).

²² *Id.* at 215.

²³ *Id.* at 215-16.

²⁴ *Id.* at 220 (citing *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 148, 381 P.2d 605 (1963); *Falconer v. Safeway Stores, Inc.*, 49 Wn.2d 478, 479, 303 P.2d 294 (1956); *Harrison v. Whitt*, 40 Wn. App. 175, 698 P.2d 87 (1985), *review denied*, 104 Wn.2d 1009 (1985)).

the accident, the plaintiff only offered speculation and there was not sufficient evidence of to create a question of fact regarding constructive notice.²⁵

Likewise, in *Iwai v. State*,²⁶ a plaintiff slipped in a parking lot and attempted to show that the property owner had constructive notice of the ice on which the plaintiff slipped.²⁷ The plaintiff asserted that the property owner's knowledge that the parking lot "could become dangerous with some amount of snow or ice accumulated on it" should be sufficient to establish constructive notice.²⁸ The court rejected this approach, saying that the plaintiff must show constructive notice of the specific defect complained of and noted that the plaintiffs had not presented any "evidence giving any indication of how long the particular icy condition had existed."²⁹ As such the court noted that the "[p]laintiffs failed 'to establish how long the specific dangerous condition existed. . . . Under the traditional rule, the lack of such evidence precludes recovery.'"³⁰

In this case, and as will be more fully explained below, Johnson has not presented any evidence showing how long the allegedly hazardous

²⁵ *Id.* at 216, 221.

²⁶ 129 Wn.2d 84, 915 P.2d 1089 (1996).

²⁷ *Id.* at 86.

²⁸ *Id.* at 97.

²⁹ *Id.*

³⁰ *Id.* at 97–8 (quoting *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 458, 805 P.2d 793 (1991)) (citations omitted). While the court concluded that the plaintiffs had failed to demonstrate constructive notice, it went on to consider other possible routes of liability applicable to premises liability cases.

condition had existed prior to her accident. Without evidence supporting this essential element of constructive notice and therefore the City's duty of care, the City is entitled to summary judgment as a matter of law.

3. The Gill Letter is inadmissible and cannot be relied upon to establish constructive notice.

In response to the City's motion for summary judgment, Johnson asserted that the City had constructive notice but did not offer any evidence regarding how long the alleged defect had existed or the extent of the alleged defect except for an unsworn letter from her "human factors" expert, Gill. Gill's statements, however, were not in the form of a declaration or other admissible evidence. Instead, Johnson simply submitted an unsworn preliminary letter from Gill. The Gill letter does not comply with CR 56(e), which requires that: "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."

The Court should disregard the Gill letter (1) as an unsworn affidavit and inadmissible hearsay, (2) as lacking a factual basis and therefore speculative, and (3) as stating assertions outside of the expert's expertise. Even if the Gill letter was admissible, its conclusory and

speculative assertions are not sufficient to defeat a motion for summary judgment.

a. The Gill letter is inadmissible as an unsworn affidavit and hearsay.

The Gill letter must be disregarded because it is an unsigned, unsworn letter and is therefore inadmissible hearsay for the purposes of opposing summary judgment.³¹ In *Young Soo Kim v. Choong-Hyun Lee*,³² this Court noted that “we are aware of no case, nor has any been cited to us, that excuses in whole, the requirement that statements purporting to establish a necessary element of a claim or defense, be in the form of sworn affidavits or declarations made under penalty of perjury.”³³

In *Young Soo Kim* a patient filed a medical malpractice action against his former dentist.³⁴ To contest summary judgment, the plaintiff relied upon (1) an unsworn and unsigned exhibit attached to the declaration of plaintiff’s counsel, in which expert Dr. Lee provided his opinion on the cause of the plaintiff’s injuries and (2) a signed, but unsworn, letter from Dr. Lee, attached to the plaintiff’s declaration, describing the defendant’s negligent treatment.³⁵ This Court rejected any consideration of the two documents, explaining that “CR 56(e) requires

³¹ See *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 300 P.3d 431 (2013).

³² 174 Wn. App. 319, 300 P.3d 431 (2013).

³³ *Id.* at 327.

³⁴ *Id.* at 320.

³⁵ *Id.* at 325–26.

that evidence offered in support of or in opposition to a motion for summary judgment be in the form of sworn affidavits or declarations made under penalty of perjury.”³⁶ Because “the statements from [Dr.] Lee [were] not in such form, [the plaintiff could not] rely upon them to create a disputed issue of material fact.”³⁷

Here, as in *Young Soo Kim*, the Gill letter is not admissible. The letter is not a sworn affidavit or a declaration signed under the penalty of perjury as required by CR 56(e). As such, the letter is wholly inadmissible hearsay and cannot be used to defeat the City’s motion for summary judgment.³⁸ Plaintiff’s counsel’s declaration may serve to authenticate the letter under ER 901, but to be admissible, the letter must also meet a hearsay exception under ER 802, which it cannot do. The letter is nothing more than an out of court statement offered to prove the truth of the matter asserted. Even if the letter’s content was relevant, it cannot be considered competent evidence and cannot create a disputed issue of material fact on an essential element.³⁹

³⁶ *Id.* at 326.

³⁷ *Id.* at 327.

³⁸ CR 56(e) (affidavits “shall set forth such facts as would be admissible in evidence”); *Lynn*, 136 Wn. App. at 309 (“A party cannot rely on inadmissible hearsay in response to a summary judgment motion.”); ER 802.

³⁹ *Turngren v. King County*, 33 Wn. App. 78, 83 n.3, 649 P.2d 153 (1982), *reh’g denied*.

b. The Gill letter is inadmissible as it lacks a factual basis.

The Gill letter also must be excluded because in the context of a summary judgment motion, an expert must support her opinion with an adequate factual basis.⁴⁰ In an attempt to establish constructive notice, Johnson relies upon conclusory statements by Gill that the “hazardous condition was not due to a sudden onset or acute failure” but that “it would take many years for a sidewalk to degrade to this condition” and, on the basis of an ambiguous photo, that the “perturbations are well in excess of the ¼ inch – ½ inch rule.” CP 94. These statements, however, lack a factual basis and are therefore inadmissible.

Gill specifies that her opinions are not based on personal knowledge because she never inspected the sidewalk. CP 90. Rather, Gill’s conclusory statements are based upon deposition testimony and unauthenticated photographs. CP 90. The photograph that Gill primarily relies upon is taken at an unknown zoom, from an unknown distance, and at an unknown angle. CP 90, Figure 2. This unreliable evidence cannot supply an adequate factual basis, as demonstrated by both of Gill’s speculative and conclusory statements.

⁴⁰ *Rothweiler v. Clark County*, 108 Wn. App. 91, 101, 29 P.3d 758 (2001), *as amended*, *review denied*, 145 Wn.2d 1029, 42 P.3d 975 (2002).

Gill doesn't actually say how large or small the alleged displacement was, only that it was "well in excess of" her arbitrary rule.⁴¹ Gill does not indicate that she actually made any calculations and does not provide any scientific methodology that would support her conclusion. In fact, there is nothing in the Gill letter that indicates that she can provide an expert opinion on the size of an alleged deflection from an unauthenticated picture taken at an unknown zoom, from an unknown distance, and at an unknown angle. Gill's conclusion is based on an assumption she draws from a factually unreliable picture.

Gill also speculates that the "hazardous condition was not due to a sudden onset or acute failure; it would take many years for a sidewalk to degrade to this condition." CP 94. Again, Gill provides no factual basis for this assumption and no explanation of how she reached this "conclusion."⁴² To the extent she bases this conclusion on her guesstimate of the size of the alleged deflection, her speculation is based on bad evidence.

⁴¹ Gill clearly rejected, as inaccurate, Johnson's deposition testimony that the defect was a hole three inches wide and two inches deep. Even the poor quality photographs demonstrate that Johnson's opinion is inaccurate.

⁴² Gill's statement is not an expert opinion. Gill provides three "opinions" in her letter relating to (1) whether the sidewalk was hazardous, (2) whether the City's and abutting property owners' actions/omissions were the reason the alleged defect existed, and (3) whether Johnson's actions contributed to the accident. CP 91. Gill did not officially opine on the cause, extent, or duration of the alleged defect.

Compounding the matter, Gill does not even speculate about how long the alleged defect was hazardous. Instead, Gill makes clear that a deflection of up to one-quarter to one-half inch would not violate her preferred “rule.” Her conclusory statement, however, does not give any indication of how long the alleged defect may have violated this rule—only that the sidewalk would have begun to deteriorate many years ago. Gill gives no indication as to the rate at which the sidewalk allegedly deteriorated or whether the deterioration accelerated at any time. Even if the Court assumes that the sidewalk deteriorated over “many years,” the Gill letter makes clear that for some period of time the sidewalk would be deteriorating, but not yet hazardous. Thus, even Gill’s speculation does not provide any evidence regarding how long the hazardous condition had existed. Even if the sidewalk was hazardous on the day of the fall Gill gives no indication if the deterioration become hazardous one day, one week, one month, one year, or one decade before the fall. According to Johnson, at sometime within “many years” a harmless crack turned into an allegedly hazardous condition, but Johnson leaves us with nothing but speculation as to when that occurred.

Gill’s speculation that the alleged condition was hazardous was based on factually unsupported conclusions about the size and duration of the alleged defect. Because her ultimate conclusion is based on factually

unsupported opinions, even her conclusion that the alleged defect was hazardous cannot be trusted.

Conclusory statements lacking an adequate factual basis will not be admitted⁴³ and do not create an issue of material fact that defeats a motion for summary judgment.⁴⁴

c. Gill is not qualified to provide an expert opinion on the cause, effect, or duration of an alleged sidewalk defect.

Nothing in Gill's unsworn letter suggests she has any expertise related to the cause, extent, or duration of sidewalk defects. Gill specifically bases her "findings and opinions" on her "training, experience, and expertise in the field of Human Factors Engineering." CP 90. While Gill does not define what "human factors engineering" is, the City understands it to generally be the "application [to design engineering] of capabilities and limitations of human beings as they relate to their physical environment."⁴⁵ Being a "Human Factors Engineer" does not qualify Gill to identify the cause, extent, or duration of a sidewalk defect, especially from oral descriptions and ambiguous photos. Likewise, Gill's curriculum vitae, attached to her unsworn letter, does not indicate that Gill received any training or education related to sidewalk design,

⁴³ *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991).

⁴⁴ *Lane v. Harborview Medical Center*, 154 Wn. App. 279, 288, 227 P.3d 297 (2010).

⁴⁵ *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 897 n.1, 223 P.3d 1230 (2009).

construction, or maintenance and does not indicate that she has had any practical experience with the design, construction, or maintenance of sidewalks. CP 98–100.

Nothing in Gill’s letter establishes that she is qualified to calculate the extent of an alleged defect from unsubstantiated oral descriptions and ambiguous photos. Likewise, nothing in Gill’s letter establishes that she is able to calculate how long an alleged defect has existed from unsubstantiated oral descriptions and ambiguous photos. Gill does not even offer an opinion on what caused the alleged defect—be it settling of material beneath the sidewalk, a crushing of the sidewalk by a heavy object, or normal deterioration—only that it must have taken “many years.”

Because Gill is not qualified as an expert with regards to the cause, extent, and duration of the alleged defect, her allegations do not assist the trier of fact to understand the evidence and are not properly admitted under ER 702. The statements are merely speculative and conclusory allegations of a potential witness and are not sufficient to create a question of fact.

4. Ms. Johnson failed to create a question of fact as to how long the allegedly hazardous condition existed, the City's lack of constructive notice, or the City's lack of duty to protect Ms. Johnson.

Constructive notice is established by the combination of time and evidence regarding the City's opportunity to observe the defect under the circumstances.⁴⁶ Here, Johnson attempts to ignore the necessary time element and focuses on City employees being "in the area" of the alleged defect to speculate that the City had an opportunity to observe the alleged defect prior to Johnson's accident. There are several problems with this focus. First, the "area" covered by the 14 service requests was several blocks and dealt with work in streets, alleys, and sidewalks, thereby giving no indication that City employees were in a position to view the alleged defect. Second, these 14 service requests present evidence of an opportunity to observe only if (1) the alleged defect existed for all 10 years covered and (2) the alleged defect, when existing, was capable of being seen—Johnson alleges that she could not see it even as she approached it on foot. CP 84, 90–96. Further, all of the inferences Johnson wishes the Court to draw from these assertions are entirely irrelevant without Johnson addressing the time element of constructive notice.

In this case, there is no direct evidence of when the alleged defect was caused. Johnson could use circumstantial evidence to establish the

⁴⁶ *Morton*, 75 Wn.2d at 397.

time period during which the alleged defect existed, but may not simply rely on speculation. While Johnson speculates that the alleged defect materialized over many years, Johnson points to no circumstantial evidence supporting this inference. Because Johnson has failed to present evidence as to what caused the alleged defect or as to how long the alleged defect had been present, Johnson failed, as a matter of law, to establish that the City had constructive notice of the alleged defect.

The cases cited by Johnson to support her position actually support the essential nature of the time element and, in any event, are distinguishable from this case. In *Skaggs v. Gen. Electric Co.*,⁴⁷ the court had facts establishing that the defect had existed “from nine o’clock a.m. until four o’clock p.m.”⁴⁸ This short time period was sufficient because the defect was boldly obvious to anyone passing it in a vehicle—a stop sign bent across the sidewalk—and was located in a busy area. In *Hartley v. Tacoma Sch. Dist. No. 10.*,⁴⁹ the icy and snowy sidewalk had been present for almost one week.⁵⁰ This time period was sufficient because the defect was obvious—accumulated ice and snow—, was located outside a busy school, and City employees had been in the specific area during the period that the snow and ice was present.

⁴⁷ 52 Wn.2d 787, 328 P.2d 871 (1958).

⁴⁸ *Id.* at 790 (emphasis added).

⁴⁹ 56 Wn.2d 600, 354 P.2d 897 (1960).

⁵⁰ *Id.* at 602 (emphasis added).

Skaggs and *Hartley* clearly establish that where the particular circumstances of a case make an alleged defect obvious, constructive notice can be found even when the defect has only existed for a short period of time. However, even where the alleged defect is obvious, some proof of the period during which the alleged defect existed is an essential element and was established in those cases.

Here, where Johnson failed to present any evidence establishing the period of time that the alleged defect had been present and the alleged defect was effectively hidden, the City could not be charged with constructive notice. Because there was no evidence establishing this essential element or supporting the very foundation of the City's duty to Johnson, the trial court properly granted summary judgment.

5. Even if Ms. Johnson can establish a time element, there is no question of fact that the City lacked constructive notice and her arguments lack merit.

Even if Johnson had evidence showing how long the alleged defect existed, her evidence fails to show that the alleged defect was hazardous, that the City should have found the allegedly hidden defect, or that the City had an opportunity to correct the alleged defect prior to the accident. Johnson relies upon her expert's baseless assertion that the alleged defect violated inapplicable standards that apply to new construction without any

showing that they are necessary to provide *reasonably safe*, as opposed to perfect, sidewalks. Further, the mere fact that Johnson fell does not establish that there was a hazardous condition.⁵¹

Johnson also argues that her failure to detect the “hidden defect” was reasonable, but that the City should be charged with constructive notice of this same defect. The fact that Johnson, walking on the sidewalk and watching where she was going could not see the alleged defect clearly demonstrates that the City did not have an opportunity to discover or address the alleged defect. Johnson’s failure to establish either that the hazard was dangerous, that the City should have found it, or that the City had the opportunity to fix it would be fatal. Where she has failed to establish all three, summary judgment is proper.

Johnson raises several irrelevant points that, while immaterial to the issue on appeal, should be addressed. First, the City did not move for summary judgment on the basis that the alleged defect was open and obvious, as Johnson alleges. Brief of Appellant, p. 6. In response to the summary judgment motion brought by the defendant property owners, the City joined the property owners’ open and obvious argument to the extent that Johnson failed to rebut it. CP 128–34. Regardless, the City does not believe that the trial court granted summary judgment on the basis that the

⁵¹ *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967).

alleged defect was open and obvious, only on the basis that Johnson failed to create a material issue of fact as to the City's lack of actual or constructive notice. Johnson's arguments on appeal regarding the open and obvious nature of the alleged defect are irrelevant. Even if there is a question of fact on this issue, the lack of a question of fact with regards to the City's lack of constructive notice supports summary judgment.

Second, Johnson appears to possibly argue that the City had actual notice of the alleged defect because it "had viewed the sidewalk no less than 14 times over the prior 10 years." Brief of Appellant, p. 8. But the declaration of James Roy Harris established that the City did not have actual notice and nothing that Johnson has put in the record refutes this undisputed fact. CP 166-68.

Third, Johnson argues that a City employee "believed the sidewalk defect that caused Johnson's fall rendered the sidewalk unfit or unsafe for public travel." Brief of Appellant, p. 11. Johnson is correct that approximately four month after Johnson's accident, a City employee without notice of the alleged defect or accident, elected to replace a portion of sidewalk where Johnson alleges she fell. CP 64. The record does not reflect why the alleged defect was repaired and in fact shows that the City employee did not have any recollection of the alleged defect, only that the employee independently discovered and addressed the state of the

sidewalk without knowledge of Johnson's accident.⁵² CP 39. If anything, this fact shows the extent to which the City proactively provides reasonably safe sidewalks.

These misstatements, however, are immaterial to the appeal as they do not weigh on the central issue of this case; whether the trial court erred in concluding that Johnson did not present evidence creating a question of fact as to how long the alleged defect existed in a hazardous condition prior to Johnson's accident and that the City could not be charged with constructive notice.

G. CONCLUSION

While the City does not contest that Johnson tripped on a City sidewalk, the City cannot be and is not the insurer of its 739 miles of sidewalks. Nor has Johnson claimed that the City caused the defect or had actual knowledge of the defect. Instead, her case was based solely on her claim that the City had constructive notice of the alleged defect.

In response to the City's summary judgment motion, however, Johnson did not present any admissible evidence from which a reasonable juror could have found that the alleged defect existed for a sufficient period of time and under such circumstances as to provide the City an

⁵² Of course, evidence of subsequent remedial measures is not admissible. ER 407.

opportunity to correct it or be charged with constructive notice of it. Based on that failure, the Court should find that the trial court properly granted the City's motion for summary judgment.

The Court should also find that the Gill letter could not provide the necessary evidence because it was not admissible and was nothing more than conclusory and speculative allegations. Because Johnson has failed to establish a question of fact as to constructive notice, the City had no duty as a matter of law and summary judgment for the City was proper. The trial court should be affirmed.

RESPECTFULLY SUBMITTED this 24th day of February, 2014.

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CERTIFICATE OF SERVICE

I, Christina Wiersma, certify under penalty of perjury under the laws of the State of Washington that I am employed as an Assistant in the Everett City Attorney's Office and that I caused a copy of this Brief of Respondent City of Everett to be served upon the following counsel in the specified manner:

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Executed at Everett, Washington, this 24th day of February, 2014.


Christina Wiersma

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