IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RAEGAN McKIBBIN, a single woman, Appellant, v. CITY OF SEATTLE, a municipal corporation, Respondent. PUGET SOUND ENERGY, INC., a public for-profit corporation; and PILCHUCK CONTRACTORS, a for-profit Washington corporation, and a subsidiary of MICHELS CORPORATION, a Washington corporation, Defendants.	)	NO. 65177-3-I DIVISION ONE UNPUBLISHED OPINION FILED: May 31, 2011

Lau, J. — A municipality has a duty to maintain its parking strips in a reasonably safe condition. But the municipality must have notice and an opportunity to repair before it can be held liable, unless the municipality, itself, creates the unsafe condition. Because issues of material fact remain regarding whether the City of Seattle breached

its duty by creating an unsafe condition and because the trial court erred when it struck the expert's report, we reverse the trial court's order granting summary judgment to the City and remand for proceedings consistent with this opinion.

FACTS

We view the facts in the light most favorable to Raegan McKibbin. In January 2005, McKibbin and Michael Clark moved into a house in Seattle's Greenwood neighborhood. This city block has no sidewalks or curbs. There is a gravel parking strip between the McKibbin/Clark home and the asphalt street and most of the homeowners park on that strip.

The City annexed this area in approximately 1955. The drain at issue in this case is part of a ditch and culvert system inherited by the City at that time. "The particular box in front of Ms. McKibbin's home is comprised of a roughly rectangular shaped wooden cover with four pieces of treated lumber. The box is constructed in the ground, made of cement and extends underground about 3 feet." "The grate[1] was composed of cut down wooden 4x6 beams. Plywood and 2x4 spacers were used to separate the beams."

When McKibbin and Clark moved into the home, McKibbin noticed "there was a board missing completely out of [the cover] and the concrete around the edge of the grate had deteriorated and crumbled into the grate." McKibbin notified the City. The City did not immediately respond. McKibbin then observed a neighbor "just about step

[1] The words "cover" and "grate" are used interchangeably.

into the grate." McKibbin again notified the City. This time, the City responded by installing a wood board in the location where one board was missing, replacing the three existing wood boards with three new wood boards, and repairing the concrete.[2] McKibbin "couldn't believe that [the City fixed the drain with wood]." McKibbin and Clark "went out and tested it and jumped up and down on it and it seemed like it was fine." But after the repair, "[the City says] it's fixed but you can kick the board and it will fall, when it gets dried . . . ." The record reveals no complaints to the City about this drain between the 2005 repair and McKibbin's injury.

In September 2007, Pilchuck Contractors performed work on the gas line along parts of Midvale Avenue North. While Pilchuck was working, McKibbin and Clark observed a backhoe parked on the wood drain cover. They observed Pilchuck employees pointing at the cover after moving the backhoe. After the workers left, McKibbin and Clark observed a tire track on the cover. McKibbin said the cover appeared "compromised" and one board "was sitting a little bit lower than the rest of the boards . . . it might possibly have been broken but I couldn't see any visible things wrong other than it was maybe an inch or two lower than the other pieces of wood . . . ." McKibbin and Clark again jumped up and down on the cover to test its strength, and it seemed sturdy. McKibbin and Clark did not notify the City about any drain cover problems at that time.

One month later, on October 14, 2007, McKibbin moved her car slightly away

[2] The record is unclear whether the City replaced the three existing wood boards with three new wood boards, but this may be inferred from McKibbin's testimony.

from a fence so she could check the oil. The car was on the parking strip and next to the drain. As she got out of her car, she stepped on the wood cover and one of the wood boards split into two pieces. Her left leg fell into the drain while her right leg remained on the level of the parking strip, causing her to "do[ ] the splits." She suffered injuries, including a herniated lumbar disc in her back.

McKibbin sued the City of Seattle, Pilchuck Contractors, and other defendants for negligence.[3] The City filed a motion for summary judgment. McKibbin filed a response, which included an expert report from forensic consultant Bryan Jorgenson. The City filed a motion to strike Jorgenson's report. In response, McKibbin submitted Jorgenson's declaration addressing deficiencies cited by the City. The court granted the motion for summary judgment and motion to strike Jorgenson's report.[4]

McKibbin filed a motion for reconsideration, which the court denied.[5] McKibbin appeals the court's grant of summary judgment and its ruling striking Jorgenson's expert report.

Expert Report

McKibbin argues that the court erred when it struck a report by her expert,

[3] Only the claim against the City of Seattle is at issue in this appeal.

[4] The order granting summary judgment states that the motion to strike Jorgenson's "declaration" is granted. But the parties agree that this was a scrivener's error and the court actually struck Jorgenson's "report."

[5] The notice of appeal also states that McKibbin appeals the denial of the motion for reconsideration. RAP 2.4(f). Given our disposition of the case, we need not address this issue.

forensic consultant Bryan Jorgenson. The City responds that the court properly excluded Jorgenson's report because (1) it is irrelevant to the issue of notice to the City, (2) he has no relevant experience, education, or training, and (3) his analysis lacks foundation. "'The de novo[6] standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.'" Cornish College of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 215, 242 P.3d 1 (2010) (quoting Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).[7]

After the City filed a motion for summary judgment on January 8, McKibbin filed a response and declarations from McKibbin and her counsel on January 26. Counsel's declaration attached as an exhibit, Bryan Jorgenson's report.[8] Two days later, on

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[6] The City erroneously asserts that an abuse of discretion standard applies even for evidentiary rulings in the course of summary judgment proceedings. But the City cites pre-1998 law. Folsom makes clear that the de novo standard applies.

[7] We also note that "materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal. Thus, it is misleading to denominate as a 'motion to strike' what is actually an objection to the admissibility of evidence that could have been preserved in a reply brief rather than by a separate motion." Cameron v. Murray, 151 Wn. App. 646, 658, 214 P.3d 150 (2009).

[8] The report stated the materials relied upon by Jorgenson, and summarized his analysis and conclusions. He concluded that the heavy equipment McKibbin observed was "the only reasonable explanation for the ultimate failure of a beam of such dimensions." He also stated,

"The drain of interest was located in what was essentially a street parking area open to general use. In such a location, a wide variety of vehicular traffic would occur (including such heavy vehicles as required by maintenance) leading to a variety of loads, some of which would be maintained for many hours. In such a foreseeable situation, wood was a poor choice. In this application wood was far weaker than steel,

January 28, the City filed a motion to strike Jorgenson's report, arguing (1) the opinions lacked foundation, (2) Jorgenson was not qualified, (3) the report was not authenticated, and (4) the report was irrelevant to the City's notice. The City filed its summary judgment reply on February 1. McKibbin filed her response to the motion to strike two days before the summary judgment hearing on February 3 and attached a more detailed declaration[9] from Jorgenson explaining his background, the foundation for his opinions, and his analysis. On February 3, the City filed a reply on its motion to strike, reiterating the same objections to the report and objecting to the tardy Jorgenson declaration. At the summary judgment hearing on February 5, the court granted the motion to strike the expert report and the City's summary judgment motion. The court's order does not state the grounds for striking the report.

We conclude Jorgenson's report addressed to McKibbin's counsel was properly authenticated by counsel's declaration, a point the City does not contest in their

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and more importantly it deteriorates more quickly—also foreseeable. The overwhelming material of choice for such applications is steel, or iron.

". . . . The use of inferior material as a grate cover resulted in an otherwise easily avoided injury accident to Ms. McKibbin."

[9] "The City did not move to strike the Declaration of Bryan Jorgenson, which was filed in response to the City's Motion to Strike the Report of Bryan Jorgenson." Narrative Report of Proceedings at 3. Although the City objected to the timeliness of this declaration below, neither party asserts that the declaration was stricken from the record. At oral argument, the City asserted that the declaration was before the court only on the motion to strike because it was not timely. The City makes no persuasive argument regarding prejudice caused by the untimely declaration. And because the court did not strike the declaration and it was before the court at the summary judgment hearing, it is properly before this court in its de novo review. RAP 9.12.

appellate brief. See Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 87 P.3d 774 (2004) (expert report addressed to counsel properly authenticated by counsel's declaration).

The City also argues that Jorgenson's report was irrelevant to the issue of notice to the City about the defect in the drain cover. But as discussed below, no notice is required where a municipality creates a dangerous condition.

The City next argues that Jorgenson's qualifications and analysis do not meet the requirements of ER 702.[10] "An expert's opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert's testimony is helpful to the trier of fact. We construe helpfulness to the trier of fact broadly." Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (citation omitted). "The witness need not possess the academic credentials of an expert; practical experience may suffice. . . . Expertise in a related field may be sufficient." 5D Karl B. Tegland, Washington Practice: Evidence, author's cmts. at 360 (2010-11 ed.); see also Goodman v. Boeing Co., 75 Wn. App. 60, 877 P.2d 703 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995) (registered nurse was qualified to testify that plaintiff's physical condition would deteriorate over time).

Here, the City's arguments go to weight rather than admissibility. Keegan v. Grant County Pub. Util. Dist. No. 2, 34 Wn. App. 274, 283, 661 P.2d 146 (1983) ("Once

[10] ER 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

the basic requisite qualifications are established, any deficiencies in an expert's qualifications go to weight rather than the admissibility . . . ."). The City argues that Jorgenson has no experience, education, or training in engineering, the properties of wood, drain systems, or the properties of metals. But Jorgenson explained in his declaration the relevance of his physics background in determining the properties of wood and metal, his methodology in determining that wood is deficient for drain hole covers, and the basis of his conclusions about the standard of care and the City's performance. Jorgenson has a bachelor's degree in physics. During the course of his physics studies, he "specifically studied the elasticity of beams under load and the resulting deflection and ultimate failure of such beams." His testing in this case used "one of the strongest readily available woods . . . ." The calculations he performed "were specific to the strength of a beam under flexural loading. The equations used only required the geometry of the span and beam, and the properties of the beam material." He also testified about the concept of "creep failure," wherein wood suffers fiber damage and fractures, which leads to ingress of water that weakens the wood. Because wood is far weaker and deteriorates much more quickly than metal, metal rather than wood was the industry standard for drain hole covers in 2005.

We conclude the trial court erred by striking Jorgenson's report.[11] The report and declaration are properly before this court in its de novo review of the record to determine whether summary judgment was properly granted to the City. Cameron v. Murray, 151 Wn. App. 646, 658, 214 P.3d 150 (2009). This evidence is probative of

[11] Notably, the City presented no opinions from any experts.

the central question here—whether the City breached its duty by creating an unsafe condition.

Summary Judgment

McKibbin argues, "WPI 140.01, the regular instruction regarding the duty of a governmental entity to maintain sidewalks, streets and roads, provides the rule of law in this case. The Trial Court erred in applying the alternative instruction, WPI 140.02."[12] Appellant's Br. at 19. McKibbin argues that according to Jorgenson's testimony, metal drain covers, not wood, were the industry standard in 2005 when the City repaired the drain at issue here. Relying on Jorgenson's testimony, McKibbin asserts that wood deteriorates over time and cannot support the weight of foreseeable vehicular traffic. Therefore, the City's repair using wood rather than metal breached its "duty to use

[12] The parties do not dispute that WPI 140.01 and .02 correctly set forth the City's duty. We do not address the proper jury instructions to be given here because that issue depends on the trial evidence.

WPI 140.01 states: "Sidewalks, Streets, and Roads—Duty of Governmental Entity

"The [county] [city] [town] [state] has a duty to exercise ordinary care in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to keep them in a reasonably safe condition for ordinary travel." (Alterations in original.)

WPI 140.02 states: "Sidewalks, Streets, and Roads—Notice of Unsafe ConditioN

"In order to find a [town] [city] [county] [state] liable for an unsafe condition of a [sidewalk] [street] [road] that was not created by its employees, [and that was not caused by negligence on its part,] [and that was not a condition which its employees or agents should have reasonably anticipated would develop,] you must find that the [town] [city] [county] [state] had notice of the condition and that it had a reasonable opportunity to correct the condition [or give proper warning of the condition's existence].

"A [town] [city] [county] [state] is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care." (Alterations in original.)

ordinary care to keep its streets reasonably safe for ordinary vehicular and pedestrian traffic." Appellant's Br. at 20. This failure, McKibbin asserts, created an unsafe condition that required no notice to the City.

In contrast, the City relies on WPI 140.02 to argue the court properly granted summary judgment because there is no fact question on the breach of duty issue. According to the City, it "did not create the alleged unsafe condition; therefore notice is required before the City's duty is triggered." Resp't's Br. at 10. In particular, it argues that it did not create the ditch and culvert system, of which the drain hole cover is a part, and the City parked no heavy machinery on it. And after it repaired the cover in 2005, it received no complaints until 2007 when McKibbin reported her injury. From these facts, the City argues, no liability attaches as a matter of law since it had no notice of the dangerous condition.

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. Simpson Tacoma Kraft Co. v. Dep't of Ecology, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002). This court construes facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 795, 64 P.3d 22 (2003).

"To prove negligence, the plaintiff must establish (1) a duty owed to the complaining party, (2) breach of that duty, (3) resulting injury, and (4) proximate cause."

Wilson v. City of Seattle, 146 Wn. App. 737, 741, 194 P.3d 997 (2008). "Today, governmental entities are held to the same negligence standards as private individuals." Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

"A municipality has a duty to maintain its parking strips in a reasonably safe condition." Wilson, 146 Wn. App. at 741. "What constitutes a reasonably safe condition on a parking strip is not the same as it is for a sidewalk because a sidewalk's purpose is mainly pedestrian use, while a parking strip frequently contains utility poles and meters, fire hydrants, trees, grass, and other ornamentation." Wilson, 146 Wn. App. at 741.

Before a governmental entity may be liable for an unsafe condition it did not create, it must have notice of the condition and a reasonable opportunity to correct it. Wright v. City of Kennewick, 62 Wn.2d 163, 381 P.2d 620 (1963); WPI 140.02. But where a municipality creates the dangerous condition, no notice is required. Batten v. S. Seattle Water Co., 65 Wn.2d 547, 550-51, 398 P.2d 719 (1965). Nor is notice required where the City should have reasonably anticipated the condition would develop. WPI 140.02 and its comments; Argus v. Peter Kiewit Sons' Co., 49 Wn.2d 853, 860-61, 307 P.2d 261 (1957).

In Batten, the City contended it had no notice that a water meter box's lid had tilted and, therefore, could not be held liable when the plaintiff fell into the box and was injured. Our Supreme Court rejected the City's argument, relying on the principle that, "where a municipal corporation creates the dangerous condition, no notice is required."

Batten, 65 Wn.2d at 551. In Russell v. City of Grandview, 39 Wn.2d 551, 236 P.2d 1061 (1951), our Supreme Court explained the rule:

> The city seeks to draw an analogy between the facts of this case and those involved in cases where injuries were sustained arising out of defects in streets or sidewalks, or obstructions in the way of the normal use thereof, or breaks in pipes carrying gas. Liability in such cases, and those of like import, arises out of negligence in failure to keep the instrumentalities in a proper state of repair. If the defects do not occur by reason of active negligence upon the part of the city, the duty to repair cannot arise until the city has actual or constructive notice of the defects. The city becomes negligent when, after such notice, it fails to make the necessary repairs. If, however, the dangerous condition is caused by agents of the city in the performance of their duties, the rule of liability is not based on notice and failure to repair, but upon the creation of a dangerous condition by the city.

Russell, 39 Wn.2d at 554.

While the City maintains that no duty was triggered because it did not create the unsafe condition, it acknowledges it has "a duty to exercise ordinary care in the design, construction, maintenance and repair of their public right-of-ways to keep them in reasonably safe condition for ordinary travel." Resp't's Br. at 10.

"The existence of duty is a question of law." Wilson, 146 Wn. App. at 741. But "[d]etermination of the duty issue is not exclusively a function of the court. . . . Generally, the duty to use ordinary care is bounded by the foreseeable range of danger. It is for the jury to decide whether a general field of danger should have been anticipated." Wells v. City of Vancouver, 77 Wn.2d 800, 803, 467 P.2d 292 (1970). Whether a person breached a duty is usually a question of fact to be decided by a jury, unless reasonable minds could not differ on the issue. Hertog ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

The City's argument that it did not create an unreasonably dangerous condition implicates breach and foreseeability of harm questions, which must be resolved by the fact finder. Therefore, cases relied on by the City are not persuasive because they were resolved as a matter of law.[13]

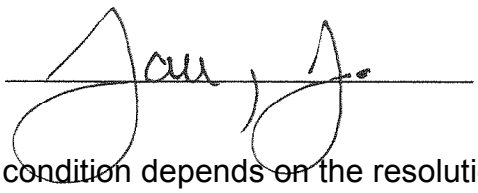
The general rule is that "'issues of negligence and proximate cause are generally not susceptible to summary judgment.'" Owen, 153 Wn.2d at 788 (quoting Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)). McKibbin asserts that the record shows issues of fact on breach. We agree. Specifically, McKibbin argues that when the City rebuilt the drain cover in 2005, the industry standard was metal, not wood. McKibbin also cites other wood covers nearby that had experienced "beam failure" and "argues the City had a 'duty to anticipate' that wood used for a street drain regularly saturated with water will lose its strength and result in an unsafe condition." Appellant's Br. at 23.

The unrebutted summary judgment evidence demonstrates that the City repaired

[13] Wilson, 146 Wn. App at 742 (where no one had ever complained about a metal manhole cover in a parking strip, "the City had no notice there was a problem of any kind," and there was no evidence "the City knew of the dangerous condition and was negligent for failing to correct, repair, or warn of it," the trial court properly granted summary judgment when a woman fell into the manhole cover because it was not unreasonably dangerous as a matter of law); Hoffstatter v. City of Seattle, 105 Wn. App. 596, 601, 20 P.3d 1003 (2001) ("We hold that as a matter of law the uneven surface of the bricks was not unreasonably dangerous."); Hunt v. City of Bellingham, 171 Wash. 174, 177, 17 P.2d 870 (1933) (where, after plaintiff complained about water meter box, a new box was installed with a cover that would not slide off, and a pick had to be used to remove the cover, the new meter box, including its lid, was "a substantial and practical one of the same kind and construction as those used in larger cities and throughout the Pacific coast," and the box was regularly inspected and showed no signs of wear or being out of order, "the city discharged its duty . . . .").

the drain cover in 2005 with wood. And McKibbin's expert, Bryan Jorgenson, testified that, "the sound scientific judgment of the vast majority of jurisdictions is to use metal drain covers. The City of Seattle uses metal for the vast majority of their drain covers. Use in the 'vast majority of situations' creates an 'industry standard.' Thus, I am testifying that metal is the industry standard for street drain covers." Jorgenson noted that wood deteriorates over time and that "[t]he fact that structural metals are stronger than wood may be easily noted by comparing the elastic strength, and ultimate strength of metal with wood." CP 286-87. He also testified, "Wood is not the best choice for a street drain cover . . . where the primary problems are exposure to the elements, moisture, and creep failure. In fact, wood is a particularly unreasonable choice for a street drain cover, for precisely these reasons." The City presented no expert testimony.

We conclude, under the circumstances here,[14] when the evidence and reasonable inferences are drawn in McKibbin's favor, material issues of fact remain on the question of whether the City breached its duty by creating an unreasonably dangerous condition. The trial court erred when it struck Jorgenson's report and granted summary judgment in the City's favor. We reverse the order granting summary judgment and striking the Jorgenson report and remand for proceedings consistent with this opinion.



[14] Whether the City had notice about the unsafe condition depends on the resolution of disputed facts. And the City's contentions rely on an erroneous standard of review related to the only expert testimony presented at summary judgment.

WE CONCUR: