IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KAREN HATCH, a married woman,	)	
	)	No. 66336-4-I
Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	
KING COUNTY, a municipal corporation; and SNOQUALMIE VALLEY SCHOOL DISTRICT No. 410	)	UNPUBLISHED OPINION
	)	
	)	
	)	
Respondent.	)	FILED: January 30, 2012

SPEARMAN, J. — Karen Hatch appeals the summary judgment dismissal of her lawsuit against King County and the Snoqualmie Valley School District No. 410 based on injuries she sustained when she fell while walking from her parked car to an elementary school. We reverse. There are genuine issues of material fact regarding constructive notice of an unsafe condition, whether the concrete wall footer was open and obvious, and whether the defendants should have anticipated potential harm even if the dangerous condition was open and obvious.

FACTS

On December 1, 2006, Karen Hatch drove to Fall City Elementary School to pick up her son from kindergarten. Because the school's parking lot was full, Hatch parked

on the road in front of the school. In order to reach the student pick up area from where she was parked, Hatch had to cross a sidewalk and step over a concrete wall footer adjacent to the sidewalk. The concrete wall footer was approximately six inches high and was the remnant of an old wall or fence that once enclosed the school. The wall footer ran almost the entire length of the 100-foot sidewalk. Beyond the wall footer, there was a grassy area that bordered the school parking lot.

While Hatch had always previously parked in the school's parking lot, the street parking along the road was also routinely used to access the school. Hatch had two five year-old children with her on the day she fell. After she parked, both children got out of the car. One child ran ahead of her. As Hatch walked toward the school, she was focused on the child in front of her to prevent her from running into the parking lot ahead. Then she turned her attention to the child behind her, to make sure he was following along. At that moment, she hit her shin against the concrete curb, heard a bone snap, and fell to the ground.

Approximately two years after Hatch's accident, the County removed the sidewalk. At the District's request and expense, the County removed the wall footer at the same time.

Hatch sued both King County and the School District for negligence. Both defendants successfully moved for summary judgment. Hatch appeals.

ANALYSIS

We review summary judgment de novo and engage in the same inquiry as the trial court. Heath v. Uraga, 106 Wn. App. 506, 512, 24 P.3d 413 (2001). Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). 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 prevail on a negligence claim, a plaintiff must prove four basic elements: (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). "Negligence 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." Bodin v. City of Stanwood, 130 Wn.2d 726, 741, 927 P.2d 240 (1996) (quoting Young v. Caravan Corp., 99 Wn.2d 655, 661, 663 P.2d 834, 672 P.2d 1267 (1983)).

The County concedes that the area where Hatch fell is within its right of way that includes the road in front of the school and the sidewalk. The County denies that it created the allegedly unsafe wall footer because it has "no definitive records of installing either the sidewalk or the historic wall/fence." According to the County, summary judgment was appropriate because it received no prior complaints that the

wall footer was hazardous, and therefore had no actual notice of any dangerous condition in the right of way. The District contends it is not liable as a matter of law because the allegedly dangerous condition was within the County's right of way, not on school property.

Government 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 government entity has a duty to exercise ordinary care to keep its public ways in a reasonably safe condition. Berglund v. Spokane County, 4 Wn.2d 309, 314, 103 P.2d 355 (1940); Owen, 153 Wn.2d at 786-87; 6 Washington Practice: Washington Pattern Jury Instructions: civil 140.01 (3d ed. Supp. 1994) (WPIC). Before a government 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); WPIC §140.02. Notice may be actual or constructive. Iwai, 129 Wn.2d at 96; Wiltse v. Albertson's, Inc., 116 Wn.2d 452, 805 P.2d 793 (1991). Constructive notice may be inferred from the elapse of time a dangerous condition is permitted to continue. Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994); Nibarger v. City of Seattle, 53 Wn.2d 228, 230, 332 P.2d 463 (1958). Determining whether an unsafe condition has existed long enough for a property owner exercising reasonable care to discover it is ordinarily a question of fact for the jury. Coleman v. Ernst Home Ctr., Inc., 70 Wn. App. 213, 220, 853 P.2d 473 (1993).

It is undisputed that the historic wall footer existed for many years. Both the County and the District speculate that it may have dated back more than seventy years. This is not a case where the allegedly dangerous condition developed suddenly providing no opportunity to take precautions. Thus, even absent evidence of safety complaints, a trier of fact could conclude there was constructive notice of the unsafe condition. See Nibarger, 53 Wn.2d at 230.

The District characterizes itself as merely an abutting land owner and insists it had no responsibility to ensure pedestrian safety on the County's right of way. The record is not sufficiently developed for us to determine the District's status with respect to the pedestrian walkway and adjacent wall footer. But even assuming that the District's position is correct and it bears only the responsibility of an adjacent land owner, when the owner of adjacent property uses a public right of way for its "own special purposes" there is a corresponding duty to keep the area in a reasonably safe condition for its "usual and customary usage" by pedestrians. Hoffstatter v. City of Seattle, 105 Wn. App. 596, 601, 20 P.3d 1003 (2001). There is evidence here indicating that the District was responsible for the wall's existence and that school employees were aware of pedestrian usage of the area connecting the road to the school parking lot. This evidence creates a genuine issue of fact as to whether the school utilized the right of way for its own purposes and if so, whether the District fulfilled its duty to maintain the area in a manner that was safe for that purpose.[1]

[1] The evidence suggesting that the District built the historic wall and paid for its eventual removal

Relying on Hoffstatter, both defendants contend that Hatch's claim fails as a matter of law because the concrete wall footer was an open and obvious condition, so there was no duty to warn or remediate. In Hoffstatter, a pedestrian tripped over uneven bricks surrounding a tree located on a parking strip between a sidewalk and a roadway. Hoffstatter, 105 Wn. App. at 598. The court determined that the uneven bricks were not unreasonably dangerous because the condition was an open and obvious one. Hoffstatter, 105 Wn. App. at 601. In reaching this conclusion, the court noted that it is "a common condition" for tree roots to dislodge pavement on parking strips and that the bricks were "not hidden." Hofstatter, 105 Wn. App. at 601. The court further observed, in contrast to sidewalks, parking strips "frequently contain such objects as power and communication poles, utility meters, and fire hydrants." Hofstatter, 105 Wn. App. at 600. For these reasons, the Hofstatter court determined that "[i]t is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when walking on a sidewalk." Id.; see also Wilson, 146 Wn. App. at 742 (manhole cover on parking strip not unreasonably dangerous because manholes in that location are common, the cover was open and obvious and specifically known to the plaintiff, and because pedestrians can be expected to pay attention while crossing a parking strip).

In this case, the alleged hazardous condition was not located on a parking strip.

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also raises the possibility that the wall footer constituted a continuing trespass on the County's right of way. At a minimum, the evidence gives rise to an inference that the District made special use of the right of way.

While the County maintains that the wall and the sidewalk were built on different occasions, it not clear that the wall footer was separate and distinct from the adjacent sidewalk. In addition, while the Hofstatter decision does not describe the appearance of the bricks at issue, here, Hatch presented evidence that the wall footer was not open and obvious, and was "camouflaged by moss, and inconspicuous in peripheral vision." This evidence creates questions of fact as to whether the wall footer was a part of the walkway for practical purposes, and if so, whether the condition of the walkway was reasonably safe for pedestrian use. See Keller v. Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

Moreover, even if the condition was open and obvious, in certain limited circumstances, there may be liability when a possessor of land "should anticipate the harm despite such knowledge or obviousness."[2] Restatement (Second) of Torts § 343A(1). "Distraction, forgetfulness, or foreseeable, reasonable advantages from encountering the danger" are factors which trigger a responsibility to warn of, or make safe, known or obvious dangers. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 140, 875 P.2d 621 (1994).

> [R]eason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be *distracted*, so that he [or she] *will not* discover what is obvious, or will forget what he [or she] has discovered, or fail to protect ... against it. Such reason may also arise

[2] The County appears to take the position in this appeal that it is subject to the duty of a governmental entity to maintain its public ways in a reasonably safe condition and is also subject to the general tort duties owed by a possessor of land. See Br. of Resp. at 8, 12. We need not decide here whether both standards in fact apply. Under either standard, factual issues preclude summary judgment.

> where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [person] in [that] position the *advantages* of doing so would *outweigh the apparent risk*.

Tincani, 124 Wn.2d at 139-40 (quoting Restatement (Second) of Torts § 343A cmt. f.

Thus, even if the wall footer was not concealed, a trier of fact could conclude there was reason to anticipate harm despite its visibility because it was located between a roadway and a school parking lot and because it appears that it was directly in an established pedestrian pathway to the school. There is also evidence supporting the inference that it was foreseeable that parents and guardians crossing the raised concrete wall footer would be distracted by the movement of children in proximity to the parking lot and the road. In other words, even if the dangerous condition was open and obvious, reasonable minds could conclude that the defendants should have anticipated the harm and taken precautions to protect against it.

Because there are genuine issues of material fact, we reverse the decision to grant summary judgment and remand for further proceedings.

Spearman, J.

WE CONCUR:

Dwyer, C.J.

Cox, J.