IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RHONDA JO GENNRICH,	)	**No. 28641-0-III**
Appellant,	)	
v.	)	
CITY OF SPOKANE, a municipal corporation,	)	**Division Three**
Respondent and Cross-Appellant,	)	
JEAN COMBS and JOHN DOE COMBS, husband and wife; and FRANCES HECKMAN and JOHN DOE HECKMAN, husband and wife,	)	**UNPUBLISHED OPINION**
Defendants.	)	

Siddoway, J. —Rhonda Jo Gennrich appeals the trial court's dismissal on summary judgment of her claim of negligence against the city of Spokane, arising out of a fall that she attributes to a defective city sidewalk. The city cross-appeals the trial court's denial of its motion to strike portions of the affidavit of Ernest L. Corp, Ms. Gennrich's

expert. We find no abuse of discretion in the trial court's evidentiary ruling and affirm its order granting summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2003, Ms. Gennrich was walking on a sidewalk adjacent to property located near the intersection of Dalton Avenue and Post Street in Spokane when she tripped and fell, breaking her nose and her left hand. Approximately a year later she filed a claim for damages with the city, in which she stated that she tripped over an uneven sidewalk "that was unnoticeable du[e] to overgro[w]th vegetation." Clerk's Papers (CP) at 10. She later described the sidewalk defect as a "lip protrude[ing] between adjacent sections of the sidewalk." CP at 141.

The city denied Ms. Gennrich's claim, pointing out that the sidewalk should have been maintained by the adjoining property owners. It provided Ms. Gennrich with the names of the owners, to whom it stated it had tendered her claim under the Spokane Municipal Code. In June 2006, Ms. Gennrich commenced suit against the city and the owners of the adjoining property.

In June 2009, the city moved the trial court to dismiss Ms. Gennrich's claims against it for failure to state a claim or for summary judgment. It supported its motion with an affidavit of Daniel Eaton, a permit coordinator for the city, who testified that all sidewalk complaints received by the city are routed and responded to by his office, which

creates a file on its investigation of each complaint, organized by the address and block of the reported defect. He testified that a search of his office's files established no record, prior to the date of Ms. Gennrich's fall, of any complaint about the sidewalk on which she fell or any work authorized on that sidewalk. The city also supported its motion with an affidavit of Samuel McKee, a local improvement district (LID) coordinator for the city, whose job responsibilities include working with city neighborhoods to identify sidewalk repair or replacement desired by the neighborhoods' representative councils. He testified that his office maintains written records and maps identifying the location of all repairs requested by the neighborhoods, whether or not LID funds for the work are ultimately appropriated by the city council, and that these files and records have been maintained "at least as far back as 2000." CP at 266. He testified that a search of his office's files for the Emerson-Garfield neighborhood, in which Ms. Gennrich resides and where she fell, established no record of any neighborhood request for repair to the complained-of sidewalk. The city argued that Ms. Gennrich had no evidence that it had breached a duty owed to her, either by causing the alleged defect or having notice of a dangerous condition and failing to correct it.

In opposing the motion, Ms. Gennrich relied on a declaration from Ernest L. Corp, Ph.D., P.E. Dr. Corp testified that he was engaged by Ms. Gennrich's counsel to analyze the city's alleged negligence in maintaining the Dalton Avenue/Post Street sidewalk in

July 2009 and conducted his analysis at the site on July 24, 2009—over six years after Ms. Gennrich's fall. CP at 100. Among opinions expressed by Dr. Corp were that "the obvious defect within the sidewalk was most likely caused by a tree root emanating from a tree located on property at W. 804 Dalton . . . located approximately 2 feet to the west of the sidewalk" and "[t]his sidewalk defect has been in existence in essentially the same manner as it is today for approximately 20 plus years as manifested by the deterioration present in the existing stump which is adjacent to the sidewalk." CP at 103. He relied upon this "20 plus year" dating to express the opinion that notwithstanding that the city had no actual notice of the defect, "the City of Spokane had knowledge of this defect because of the length of time of its existence and any cursory examination of the sidewalk in question over the course of twenty plus years, would have revealed to the City of Spokane the full nature of the defect and the hazardous condition which it presented." CP at 104.

Ms. Gennrich also submitted portions of the depositions of Mr. Eaton and Dennis Paradis, the adjuster retained by the city to investigate Ms. Gennrich's claim. Mr. Eaton testified, over objection, to an opinion that the vertical rise in the sidewalk was "somewhat" of a defect and appeared to be of "relatively" long standing, "possibly" 10 years old. CP at 42, 45. Mr. Paradis testified, over objection, that he "d[i]dn't think" there was anything about Ms. Gennrich's shoes that contributed to her fall. CP at 66.

The city moved to strike the opinion testimony of Mr. Eaton and Mr. Paradis to which it had objected and moved to strike portions of Dr. Corp's declaration. It argued that Dr. Corp lacked the training, education, and experience to opine with respect to tree roots and tree stumps and that the factual basis for his key opinions was unexplained.

At oral argument, the trial court granted the motion to strike the improper lay opinion testimony of Mr. Eaton and Mr. Paradis, but denied the city's motion to strike Dr. Corp's testimony, stating:

> Dr. Corp's testimony I think I am going to leave in with respect to the issue of the tree root. But he has a lot in there that, really, amounts to conclusions of law. . . . So those portions will be stricken.

Report of Proceedings at 20. The trial court granted the motion for summary judgment. Its order granting the motion memorialized its denial of the motion to strike Dr. Corp's declaration and itemized the Corp declaration as one of the materials reviewed and considered by the court.

Ms. Gennrich moved for reconsideration, which the trial court denied in a written opinion. The opinion stated, in part, "The basis of this court's decision rests on two points: first, the declarations of Dr. Ernest Corp do not validly create an issue of fact. They represent statements that amount to unsupported legal conclusions that are clearly outside of the realm of engineering." CP at 243.

Ms. Gennrich timely appealed the dismissal of her claims against the city and

denial of her motion for reconsideration. The city cross-appealed the order denying its motion to strike the opinion testimony of Dr. Corp.

ANALYSIS

I

We begin with the city's cross-appeal, which the city explains was filed "for the purpose of clarifying and/or correcting the lower court's record as related to the City's motion to strike [the Corp declaration]." Br. of Resp't at 1. The city argues that while the trial court "placed the appropriate weight to Dr. Corp's declaration, paragraphs 15 and 16 [opining that the tree root caused the defect, which existed for 20 plus years based on deterioration of the stump] should have been stricken because they had no factual basis, were conclusory, and invited speculation." *Id.* at 14.

A court's ruling on a motion to strike is reviewed for abuse of discretion. *Southwick v. Seattle Police Officer John Doe No. 1*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008).

Declarations offered in opposition to a motion for summary judgment "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." CR 56(e). In the context of a summary judgment motion, an expert must support his opinion with specific facts, and a court will disregard expert

opinions where the factual basis for the opinion is found to be inadequate. *Anderson Hay & Grain Co. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 259, 76 P.3d 1205 (2003) (citing *Rothweiler v. Clark Cnty.*, 108 Wn. App. 91, 100-01, 29 P.3d 758 (2001), *review denied,* 145 Wn.2d 1029 (2002); *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 49 Wn. App. 130, 134-35, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988)), *review denied*, 151 Wn.2d 1016 (2004). ER 705, which allows experts to testify "in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data" is addressed to testimony at trial and contemplates cross-examination. It does not apply to summary judgment proceedings. *Anderson Hay*, 119 Wn. App. at 259.

Ms. Gennrich argues that Dr. Corp was qualified to opine on the cause of the sidewalk defect based on his education and work in mining engineering and geotechnical engineering, including road construction, drainage, slope stability, foundations, tunneling, and ground control. Reply Br. of Appellant at 1-2. If the reasons for admitting or excluding the expert testimony are "fairly debatable," the trial court's exercise of its discretion will not be reversed on appeal. *Keegan v. Grant Cnty. Pub Util. Dist. No. 2*, 34 Wn. App. 274, 282, 661 P.2d 146 (1983). Once an expert is qualified to give opinion testimony, any deficiencies in those qualifications go to the weight to be given an opinion, not its admissibility. *Id*. at 283.

We agree with the trial court's observation in denying reconsideration that Dr. Corp's declaration did not establish a genuine issue of fact, for reasons we discuss hereafter. But we disagree with the city's position that only an arborist would be qualified to express an opinion that the raised lip in the Dalton Avenue/Post Street sidewalk was more probably than not caused by a root from the adjacent tree. The trial court indicated in denying the motion to strike Dr. Corp's testimony that it would disregard his inadmissible legal conclusions, and it ultimately revealed, in denying reconsideration, that it did not regard Dr. Corp's declaration as raising any genuine issue of material fact. A trial court does not abuse its discretion in admitting a declaration for a limited purpose where it disregards inadmissible conclusions. *King Cnty. Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

II

Turning to Ms. Gennrich's appeal, she argues that having demonstrated a sidewalk defect that was at least 20 years old and that the city has no program for actively inspecting its sidewalks, she raised a genuine issue of disputed fact as to breach of duty, requiring trial. We review a summary judgment order de novo, viewing the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). A moving defendant may meet this initial burden by pointing out that there is an absence of evidence to

support the plaintiff's case. If a moving defendant meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989). The plaintiff must then set forth specific facts demonstrating a genuine issue for trial; summary judgment should be entered if the nonmoving party fails to establish the existence of an element essential to that party's case. *Id.* at 225. Mere allegations or conclusory statements of facts, unsupported by evidence, do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

A city owes a duty of ordinary care to maintain its sidewalks in a condition that is reasonably safe for pedestrians. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002); *Kennedy v. City of Everett*, 2 Wn.2d 650, 653, 99 P.2d 614, *amended*, 4 Wn.2d 729, 103 P.2d 371 (1940). A city is not an insurer against accidents nor a guarantor of the safety of pedestrians, however, and, with respect to a dangerous condition that it did not create, it must have notice of the condition and a reasonable opportunity to correct it before liability will arise. *Kennedy*, 2 Wn.2d at 653; *Niebarger v. City of Seattle*, 53 Wn.2d 228, 229, 332 P.2d 463 (1958). Notice can be actual or

constructive. Constructive notice to the city may be inferred from the elapse of time a dangerous condition is permitted to continue when it is long enough to be able to say that the city ought to have known about the condition. *Id.* at 230 (citing *Holland v. City of Auburn*, 161 Wash. 594, 297 P. 769 (1931)).

In this case, the evidence is undisputed that the city had no actual notice of the sidewalk defect. Nor has Ms. Gennrich presented any witness who observed the defect prior to her July 2003 fall and can speak to how long the defect has existed or whether it was apparent. Her own 2004 claim for damages characterized the defect as "unnoticeable."

The only evidence she offers on the issue of constructive notice is the testimony of Dr. Corp. But while we have granted that Dr. Corp may have been qualified to express an opinion that the defect was caused by a tree root, his testimony that the defect had existed for over 20 years based on deterioration he observed in the tree stump is not supported by any specific facts. There is nothing in Dr. Corp's engineering education, background, or training that suggests he has any qualifications to opine on the stage of decomposition of organic material. And to draw such a conclusion based on an examination of the stump made more than six years after Ms. Gennrich's fall is speculative on its face. His opinion that the duration and appearance of the defect (as characterized by him) compelled a conclusion of city "knowledge" was properly

disregarded by the trial court as an inadmissible legal conclusion.

To avoid summary judgment, Ms. Gennrich was required to present specific facts demonstrating a genuine issue that the city breached its duty by failing to repair the sidewalk, with notice, actual or constructive, of its condition. When we disregard Dr. Corp's unsupported opinions and his improper opinions, she has not met this burden. The court did not err in granting summary judgment.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.