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APPELLATE COURTS

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IN THE SUPREME COURT FOR THE STATE OF ALASKA
CLERK, APPELLATE COURTS

ETHEL B. KELLY,)
)
Appellant,)
)
v.)
)
MUNICIPALITY OF ANCHORAGE,)
)
Appellee.)
)

BY: _____
DEPUTY CLERK

Supreme Court No. S-13858

Superior Court Case #3AN-08-4271 CI

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA,
THIRD JUDICIAL DISTRICT
TO THE SUPREME COURT FOR THE STATE OF ALASKA
HONORABLE PETER A. MICHALSKI PRESIDING

APPELLANT'S EXCERPT OF RECORD
VOLUME ONE OF ONE

LAW OFFICE OF CHARLES W. COE
810 W 2nd Avenue
Anchorage, Alaska 99501
(907) 276-6173



Charles W. Coe
ABA#7804002
Attorney for Appellant
ETHEL KELLY

Filed in the Supreme Court of
the State of Alaska, this 21st
day of September, 2010
Marilyn May, Clerk

By: Marilyn May
Deputy Clerk

APPELLANT'S EXCERPT OF RECORD
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

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JAN 11 2008

Clerk of the Trial Courts

ETHEL B. KELLY,)
)
 Plaintiff,)
)
 vs.)
)
 MUNICIPALITY OF ANCHORAGE,)
)
 Defendant.)

Case No. 3AN-08- 4231 CI

COMPLAINT

COMES NOW, the plaintiff ETHEL B. KELLY by and through her attorney, CHARLES W. COE, and Maloney Law Group, who hereby alleges as her cause of action for this complaint as follows:

I

Plaintiff, ETHEL B. KELLY, is a resident of the state of Alaska, residing in the Third Judicial District, at Anchorage.

II

Defendant, MUNICIPALITY OF ANCHORAGE, is an entity authorized to exist under the laws of the State of Alaska and do business as a city within the state of Alaska.

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III

All events stated and alleged in this complaint occurred in the Third Judicial District of the state of Alaska, at Anchorage, Alaska. Defendant is vicariously liable for the acts and omissions of their employees at the Municipal Works Department and Anchorage Water and Waste Department under the theories of respondeat superior, or agency, negligence, negligent entrustment, negligent training and negligent supervision.

IV

On or about May 22, 2006, plaintiff, Ethel B. Kelly, was walking to her car and was at the intersection of 3rd Avenue and F Street. As plaintiff was crossing the street the plaintiff stepped into an uncovered pipe hole in the crosswalk/street. As a result of stepping into the hole the plaintiff fell to the ground landing on her left side and hip. She was injured as set forth in paragraph VIII of this complaint.

FIRST CAUSE OF ACTION

V

Plaintiff realleges and incorporates the facts and allegations of paragraphs-I through IV into this First Cause of Action.

VI

Defendant, Municipality of Anchorage owed a duty to plaintiff to maintain their crosswalks in a reasonable and safe manner. Defendant breached this duty by not properly covering pipe holes in the crosswalk, in not marking the pipe hole, in failing to exercise due care, in failing to warn the plaintiff of the hazard, in failing to monitor and maintain the crosswalk, and in failing to check or properly maintain the crosswalk or the pipe hole.

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VII

As a result of defendant's negligence, plaintiff suffered the injuries and damages set forth in Paragraph VIII of this complaint.

VIII

As a result of defendant's acts and omissions, plaintiff suffered the following injuries and damages:

1. Injuries to her knee, ankle, leg, hip, and back;
2. Expenses for medical treatment in the past, present, and future;
3. Physical and emotional pain and suffering in the past, present, and future;
4. Loss of wages in the past, present, and future;
5. Loss of full use of her body and loss of enjoyment of life; and
6. Other damages to be proven at trial.

WHEREFORE, plaintiff prays for a judgment for her against the defendant as follows:

- (a) For compensatory damages, in the sum within the jurisdiction of the superior court;
- (b) For pre-judgment and post-judgment interest;

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- (c) For costs and attorney fees; and
- (d) For such other relief as the Court deems just and equitable.

DATED this 10th day of January, 2008.

CHARLES W. COE
Attorney for Plaintiff



Charles W. Coe
ABA#7804002

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ETHEL B. KELLY,)	
)	
Plaintiff,)	
)	
v.)	
)	
MUNICIPALITY OF ANCHORAGE,)	
)	
Defendant,)	
)	Case No. 3AN-08-4271 CI
)	

ANSWER TO COMPLAINT

Defendant the Municipality of Anchorage (hereinafter referred to as "the Municipality") by and through the Office of the Municipal Attorney, hereby answers the Plaintiff's Complaint as follows:

1. The Municipality lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 1 of Plaintiff's complaint and therefore denies the same.

2. The Municipality denies that it is a city. It is a municipality organized under the laws of the State of Alaska.

3. The Municipality admits that the events that are alleged in the complaint occurred in the Third Judicial District of the State of Alaska at Anchorage, Alaska. ~~The~~

Municipality admits that it is the employer of employees in the Public Works Department ("Public Works") and the Anchorage Water and Wastewater Utility ("AWWU"). The remainder of paragraph 3 states a legal conclusion to which no response is required at this time.

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4. The Municipality admits that on or about May 22, 2006, plaintiff, Ethel Kelly, was walking to her car at the intersection of Third Avenue and F Street. The Municipality lacks knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations of paragraph 4 of the complaint and therefore denies the same.

FIRST CAUSE OF ACTION

5. The Municipality incorporates by reference its responses to paragraphs 1 through 4 above.

6. The first sentence of paragraph 6 states a legal conclusion to which no response is required. All other allegations contained in paragraph 6 are denied.

7. The Municipality denies the allegations contained in paragraph 7 of the Complaint.

8. The Municipality denies the allegations contained in paragraph 8 of the Complaint.

AFFIRMATIVE AND OTHER DEFENSES

1. Plaintiff's complaint fails to state a claim on which relief can be granted.

2. The conduct of the Municipality of which plaintiff complains was justified given the circumstances.

~~3. The Municipality acted in a manner that was proper, reasonable, lawful and~~
exercised in good faith.

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4. The Municipality had no duty to protect plaintiff from conditions of which it had no actual or constructive knowledge.

5. Plaintiff's injuries, if any, were caused in whole or in part by the acts or omissions of persons or entities, including plaintiff, over which the Municipality has no responsibility or control and fault should be apportioned accordingly.

6. The Municipality had no duty to plaintiff.

7. Plaintiff's claims are barred in whole or in part by AS 09.65.070(d) and other applicable immunities.

8. Plaintiff's injuries are the result of pre-existing medical and/or emotional conditions or otherwise were not caused by the Municipality in this action.

9. Plaintiff has failed to mitigate her damages.

10. Plaintiff has failed to join indispensable and/or necessary parties.

11. Any alleged damages must be limited in accordance with AS 09.17.010 and AS 09.17.040.

12. The Municipality reserves the right to assert such other and additional affirmative defenses as may be discovered during the investigation and defense of this action.

REQUEST FOR RELIEF

WHEREFORE, the Municipality respectfully requests relief as follows:

A. For judgment in favor of the Municipality and against plaintiff dismissing this action with prejudice;

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B. For judgment awarding the Municipality its costs and attorney's fees incurred in this action; and

C. For such other relief as this court deems just and equitable.

Respectfully submitted this 21st day of February, 2008.

JAMES N. REEVES
Municipal Attorney

By: Mary B. Pinkel
Mary B. Pinkel
Assistant Municipal Attorney
AK Bar No. 8505030

Certificate of Service

I hereby certify that on this
21 day of Feb, 2008
I caused to be mailed a true and
correct copy of this foregoing document to:

Charles W. Coe
805 W. 3rd Ave., #100
Anchorage, AK 99501

Patricia A. Karella
Patricia A. Karella

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Answer to Complaint
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

*Rec'd
8/7/09*

ETHEL B. KELLY,)
)
Plaintiff,)
)
v.)
)
MUNICIPALITY OF ANCHORAGE,)
)
Defendant.)

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Case No. 3AN-08-4271 CI

**DEFENDANT MUNICIPALITY OF ANCHORAGE'S
MOTION FOR SUMMARY JUDGMENT**

Defendant the Municipality of Anchorage ("Municipality"), by and through Assistant Municipal Attorney Pamela D. Weiss, hereby moves for summary judgment pursuant to Alaska Rule of Civil Procedure 56 on all claims Plaintiff has asserted against it. This motion is supported by the attached Memorandum, Affidavits and Exhibits. A proposed order is being filed concurrently.

Respectfully submitted this 21st day of July, 2009.

By: *Pamela D Weiss*
Pamela D. Weiss
Assistant Municipal Attorney
AK Bar No. 0305022

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foregoing to:
Charles Coe
Jennifer Richardson, Legal Secretary
Municipal Attorney's Office

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ETHEL B. KELLY,)	
)	
Plaintiff,)	
)	
v.)	
)	
MUNICIPALITY OF ANCHORAGE,)	
)	
Defendant.)	
) Case No. 3AN-08-4271 CI

**MEMORANDUM IN SUPPORT OF MUNICIPALITY'S
MOTION FOR SUMMARY JUDGMENT**

Defendant Municipality of Anchorage ("Municipality"), by and through the Municipal Attorney's Office, hereby moves for summary judgment in this matter. In order to prevail on her action against the Municipality, plaintiff Ethel Kelly ("Kelly") must establish that the Municipality had notice of the condition that allegedly resulted in her injury. Because she cannot, the action must be dismissed, with prejudice.

Factual and Procedural Background

Plaintiff alleges she was injured when she "stepped into an uncovered pipe hole in the crosswalk/street" at the intersection of 3rd Avenue and F Street in downtown Anchorage.¹ The "pipe hole" to which Ms. Kelly refers is the upper portion of a valve box assembly.

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¹ Complaint at para. IV.

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A valve box assembly consists of five parts: a lower portion, an extension piece or center section, an upper portion, a lid cap and a dustpan.² The assembly is located atop the valve in the water system's below-ground water main so that AWWU can access the valve and shut it off if necessary.³ There are "probably over 30,000 thousand valve boxes throughout" the city.⁴

The lid cap is visible from the street surface and is approximately 5-6" in diameter.⁵ It is approximately ¾ to 1" tall and sits on top of the valve box assembly pipe.⁶ They are not screwed or clamped down, but the weight keeps them from coming off.⁷ While it is not a common occurrence, the lid can come off for a number of reasons, including wear and tear, traffic, "poor road conditions, freeze and thaw conditions, subsoil conditions, jacking up the valve box center section" or an act of God.⁸

Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment on the law applicable to the established facts.⁹ The non-movant is required, in order to prevent summary judgment, to set forth specific

² Exhibit A, Tr of Deposition of Jamey Gilmore (3/3/09) at 6.

³ Exhibit A, Tr. at 16.

⁴ Exhibit A, Tr. at 35.

⁵ Exhibit A, Tr. at 13.

⁶ Exhibit A, Tr. at 14-15.

⁷ Exhibit A, Tr. at 15; *see id.* at 14 (using the term "gravity fit").

⁸ Exhibit A, Tr. at 49, 50, 55.

⁹ *Braund, Inc. v. White*, 486 P.2d 50, 53 (Alaska 1971).

Memorandum in Support of Motion for Summary Judgment

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facts tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists.¹⁰

Whether a party has a duty of care and, if so, the nature and scope of that duty are questions of law.¹¹ Accordingly, the issue of whether or not the Municipality has a duty to Ms. Kelly in this case is properly decided on summary judgment.

Discussion

The heart of plaintiff's complaint is that the Municipality had a duty to plaintiff, presumably either to ensure the valve cover was in place or to warn her of the absence of the cover.¹² However, plaintiff's claim fails because the law is clear that where a plaintiff alleges he/she has been injured as a result of a dangerous condition, the plaintiff must establish either that the municipality caused the condition or that the municipality had notice of the condition before it has a duty to take steps to either remedy the condition or warn of that condition.¹³

In this case, there is absolutely no evidence that the Municipality caused the condition. Plaintiff has never identified any Municipal employee or division that removed the lid. In fact, both individuals deposed in this case have reviewed their

¹⁰ *Petranovich v. Matanuska Elec. Ass'n*, 22 P.3d 451, 454 (Alaska 2001).

¹¹ *See, e.g., State v. Sandsness*, 72 P.3d 299, 301 (Alaska 2003).

¹² *See* Complaint at para. VI (alleging MOA "owed a duty to plaintiff to maintain their crosswalks in a reasonable and safe manner").

¹³ *Johnson v. State*, 636 P.2d 47 (Alaska 1981) (notice is an essential element of a negligence claim against a public entity if there is no evidence the public entity created the condition).

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Memorandum in Support of Motion for Summary Judgment
Kelly v. MOA
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records and there is no record of personnel having done any work on that valve at or near the time of the incident.¹⁴

Because there is no evidence that the Municipality caused this condition, Ms. Kelly must show that the Municipality had notice of the presence of the open valve box in order to impose a duty on the Municipality to correct and/or warn about the condition. Again, plaintiff lacks evidence sufficient to establish this critical element of her claim. There is simply no evidence that indicates AWWU (or any other Municipal department, for that matter) had been contacted or advised of the missing cover before Ms. Kelly's accident.¹⁵ On the contrary, the only evidence there is shows that shortly after Ms. Kelly's fall someone at the Hilton called AWWU's Customer Service Division to let them know about the missing cover.¹⁶ As a result of that call, Field Services promptly dispatched someone to investigate and the cover was replaced, all before 4:00pm.¹⁷

Since plaintiff is unable to establish that the Municipality had any duty, her negligence claim fails as a matter of law. Because negligence is the only theory under which plaintiff sues, her Complaint must be dismissed in its entirety, with prejudice.

Conclusion

For the foregoing reasons, the Municipality is entitled to summary judgment and Ms. Kelly's claims should be dismissed, with prejudice.

¹⁴ Exhibit A, Tr. at 32-33; Exhibit B, Affidavit of Jamey W. Gilmore at ¶ 5, attached hereto; Exhibit C, Tr. of Deposition of Wayne Bennett (3/4/09) at 39 ("I have no record of any dispatches [to the valve] through my section.").

¹⁵ Exhibit A, Tr. at 70.

¹⁶ Exhibit C, Tr. at 30.

¹⁷ See Exhibit D, Service Order Details (Exhibit 1 to Deposition of Wayne Bennett).

Memorandum in Support of Motion for Summary Judgment

Kelly v. MOA

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MUNICIPALITY
OF
ANCHORAGE

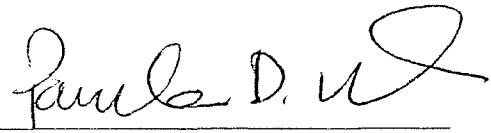
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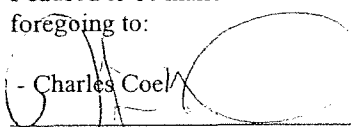
Respectfully submitted this 21st day of July, 2009.

By: 

Pamela D. Weiss
Assistant Municipal Attorney
AK Bar No. 0305022

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I caused to be mailed a true and correct copy of the
foregoing to:

- Charles Coel 

Jennifer Richardson, Legal Secretary
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Memorandum in Support of Motion for Summary Judgment
Kelly v. MOA
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1 Q Who -- who's in charge of manholes?

2 A Manholes would be -- Tim Forbus is the foreman and I'm
3 Tim's supervisor.

4 Q Who's -- in this case, it's a -- this -- are you aware
5 of what this case is about? Someone falling in a.....

6 A Basics, yeah.

7 Q And what kind of -- what kind of a system did the
8 person fall in allegedly? What would you -- what's the
9 technical term for that?

10 A That would be a valve box assembly.

11 Q And what's a valve box assembly?

12 A It's a -- they consist of five components and it's a --
13 it's an assembly that provides us access to control and
14 mainline valve for our water distribution system.

15 Q And as far as -- is there a cap on it?

16 A Yes, there's a bottom section, center section, top
17 section and a lid cap. And then there's a dustpan.

18 Q So really there's -- it sounds like there's several
19 caps on it; is that.....

20 A No, there -- there's basically one cap.

21 Q One cap.

22 A There's a -- there's a road surface cap.

23 Q And you call it a road surface cap? Is that the top
24 cap?

25 A We -- we call it a lid, but.....

1 Q And what's the purpose of the lid at the road surface?

2 A It.....

3 Q Why do you -- why do you have it there?

4 A Probably two reasons. One to protect it so somebody
5 wouldn't, you know, fall in, but also to protect debris
6 from going down the valve box.

7 Q Okay. So if you get like snow or debris going down
8 there, it could be -- it could interfere with the
9 function of the valve box?

10 A It.....

11 Q With the function of the valve system?

12 A Correct. You would have to clean this assembly out to
13 get on the control and that -- on top of the valve down
14 on the bottom.

15 Q So the valve is all the down at the bottom; is that
16 right?

17 A Correct.

18 Q Okay. And as far as -- and how far from the road
19 surface to the pipe is -- to the valve is?

20 A It varies on the depth of the main.

21 Q How big is a valve box normally -- the valve box lid
22 cover?

23 A I would have to measure it. I don't know -- I don't
24 know the -- by the top of my head. This is a five inch
25 valve box assembly. The pipe material is five inches.

1 I would have to measure this top to give you an exact --
2 I don't know that answer.

3 Q Okay. With the -- with the lid cover, where is -- is
4 there latches on it to keep it down?

5 A There's a couple of ears, if you were looking from the
6 top of it, notches that would be in the valve box top
7 section that it -- it sits in.

8 Q Okay. And when it sits in that, is it -- is -- when it
9 sits in those lids, does it -- do you turn it or
10 something so it doesn't come open or.....

11 A Just a gravity fit.

12 Q So it's a gravity fit? Okay. How -- go -- kind of
13 explain how deep are those grooves or whatever so it --
14 so it fits.

15 A I would say the lid itself is probably three quarters
16 of an inch to an inch tall.

17 Q Okay.

18 A So when it's recessed -- the -- the top section is a re
19 -- recess pipe that's formed to receive the lid. The
20 lid sits in there.

21 Q Okay. And so it sits there. Is there anything with
22 that, the recess portion, where, say, is there a groove
23 or something there to kind of hi -- that prevents it
24 from coming off? Do you know what I'm talking about?

25 A It -- no.

1 Q Okay. Okay. In other words, what prevents it from
2 coming off or what keeps it down?
3 A The weight of it basically.
4 Q Okay. So there is no latch or anything like that?
5 A That s correct.
6 Q Okay. And you don't -- you don't like screw it in or
7 anything like that so it fits firmly against the rim?
8 A Correct. Just like a manhole lid would.
9 Q And so what year could -- and -- it -- this is a
10 weighted lid, so you're hoping that the weight will be
11 sufficient to hold it -- hold it from a -- a gravity
12 situ -- standpoint onto the rim; is that right?
13 A That's how they're designed and we put them in
14 according to mass and.....
15 Q When -- when you designed, who de -- what's the -- who
16 designed them or what are you talking about? You said
17 that's according to how they're designed. Is there --
18 are there specs on it or something like that?
19 A There will be a mass spec on it.
20 Q A mass spec. You have the mass spec somewhere; is that
21 correct?
22 A Yes.
23 Q And you can give that to your counsel?
24 A Yes.
25 Q A copy of that. Sure.

1 MS. WEISS: That may be even a public document, but I
2 can.....

3 MR. COE: What's that?

4 MS. WEISS: That may even be a public document.

5 MR. COE: Okay.

6 MS. WEISS: So.....

7 Q And you'll let -- you know, if you talk to her -- you
8 can put that down for a second.

9 A Okay. Thank you.

10 Q The -- what is the purpose of the valve box?

11 A Valve box provides us access to be able to control the
12 valve that's basically connected to the main, which
13 means we can turn the valve off or turn it on. So we
14 have a key that we insert down the valve box which sits
15 on top of the operating nut of the valve itself to be
16 able to -- to control the valve.

17 Q Okay. Mr. Bennett, does he have anything to do with
18 these?

19 A As far as -- I -- I don't.....

20 Q Yeah, what's -- does he have any -- any maintenance
21 function with -- with the valve box as -- I'm taking
22 his deposition.....

23 A And.....

24 Qtomorrow.

25 A And he doesn't have a maintenance function, but, you

1 valves, the valve boxes. Are they plumber -- plumber,
2 pipefitters.....
3 MS. WEISS: Objection.
4 Qnormally?
5 MS. WEISS: Form.
6 A Some of them are.
7 Q Okay. And when you say some of them, who are the
8 people that -- you know, what are the traits that do
9 that within your department?
10 A My department would be Local 367.
11 Q 3 -- 367?
12 A Yes.
13 Q Okay. According -- I think you -- according to this --
14 according to your records, let me ask you, in Ms.
15 Kelly's case, assuming this happened on May 22nd, 2006,
16 according to your records, when was that valve box last
17 worked on by your department?
18 MS. WEISS: Objection. Asked and.....
19 Q Accord.....
20 MS. WEISS:answered.
21 A I would not know.
22 Q You don't have a record of that?
23 A I don't have -- the only record I could check would be
24 our -- our maintenance management system which I
25 believe I did. And I believe that we do not have any

1 maintenance work order for that valve, but I would have
2 to check and verify.

3 Q So do you know if any -- any other department removed
4 that valve box lid?

5 A I -- I couldn't tell you. I -- I do not have that
6 knowledge.

7 Q Would be -- there would be other departments that would
8 have -- that could have removed the valve box though;
9 is that right?

10 A An.....

11 Q Other than.....

12 A Any person.....

13 Qwithin this -- public works?

14 Acould -- could remove the valve box. But, so -- I
15 mean, I -- I -- I would not be aware of that. So it's
16 -- it's -- I can't answer your question.

17 Q Okay. And that -- that's fair.

18 A Okay.

19 Q Okay. In other words -- in other words, you can -- you
20 -- all you can say is according to your records, you
21 can only tell me when your department was last -- last
22 worked with that valve box; is that right?

23 A Correct.

24 Q You can't tell me if street -- street maintenance took
25 the valve box lid off to do -- to paint it, can you?

1 A Well, yeah. I -- I would have to look at a -- a 300
2 scale, you know, and go out there and take a look. I
3 mean, we have probably over 30,000 valve boxes
4 throughout Anchorage. So.....

5 Q Okay.

6 A I mean.....

7 Q Now, let me ask you this. And you have -- and how big
8 of a crew do you have?

9 A I personally supervise two, the excavations crews with
10 six personnel each and I have a manhole valve key box
11 crew that fully staffed would have nine individuals.

12 Q How many people is in a valve -- valve box crew?

13 A It's a manhole valve key box repair crew. There's --
14 there's one foreman and eight workers.

15 Q One foreman, eight workers?

16 A Correct.

17 Q How often are they in the downtown area meaning like
18 Second, Third, Fourth, Fifth Avenue?

19 A Well, they're a -- a corrective maintenance working
20 unit. So they would only be there if there was a
21 corrective maintenance activity. I couldn't tell you
22 how often. It would depend on what activity.

23 Q On May 22nd, 2006, do you know if there was a
24 maintenance crew working downtown?

25 A No, I do not know.

1 valve box top section. Gravity secures them in place.
2 When we're informed that the lid is off or missing, we
3 respond and put the lid back. As far as why they pop
4 off from to time, I would have to say that it is due to
5 general wear and tear on the valve box lid and top
6 section. It could also be to poor road conditions,
7 freeze and thaw conditions, subsoil conditions, jacking
8 up the valve box center section into the valve box lid.
9 And there is always a act of God.

10 Q Well, just -- okay. Let me ask you this. Within that
11 answer, isn't one of the other ways is someone who's
12 painting out there takes the lid off?

13 MS. WEISS: Objection.

14 A You can paint with the lid on or off, so I don't
15 understand the question.

16 Q Well, let me ask you -- in other words, what -- what
17 happens is a maintenance crew could take the lid off
18 when they're working out there.

19 A Correct.

20 Q And -- and as far as the -- and that particular area,
21 is that area subject to frost heaves that the lid
22 automatically comes off or.....

23 MS. WEISS: Objection.

24 Qin that?

25 MS. WEISS: Form.

1 Q You have several ways of how the lid comes off. Okay.
2 One of them is -- one of them that you're missing there
3 is that someone took it off to paint it; right?
4 A Yes. And, you know, I would have to refer back to this
5 e-mail on -- other than a person taking a lid off, I
6 was giving her other reasons of how a valve box lids
7 come off without having humans actually removing.....
8 Q Oh, okay.
9 Athe lid.
10 Q I -- I got you.
11 A Okay.
12 Q Okay. Now, since you have -- these are other non-human
13 reasons; is that right?
14 A There you go.
15 Q Okay. Let me ask you this. Let's go over the
16 non-human reasons on this particular crosswalk
17 downtown.
18 A Uh-huh. (Affirmative)
19 Q Okay. You have the non-human reasons. Which of those
20 apply here?
21 MS. WEISS: Objection.
22 Q I mean, you went out and inspected it. So let's go
23 over the non-human reasons that valve box lid would
24 come off over there.
25 A Traffic is another reason also, which -- you know, cars

1 times say in -- this happened in 2006. According to
2 your records, how many times has that -- that
3 particular lid popped off?
4 A I'm only aware of this one time that it popped off.
5 Q Okay.
6 A Or.....
7 Q You have.....
8 Athat the lid was replaced.
9 Q So you're saying it was replaced? You don't know if
10 it's repl -- when you say replaced, do you mean if it
11 was a new -- a -- an additional lid was put on it or do
12 you know if the -- the lid was found nearby and put
13 back on it?
14 A I do not know that.
15 Q Okay. That -- that.....
16 A All -- all.....
17 Q Yeah.
18 Aall I know is field service dispatched it and a
19 field service personnel out there to put the lid back
20 on. And.....
21 Q Field service is Mr. Bennett?
22 A Correct.
23 Q Okay. And as far as -- according to your records, do
24 you have any other -- any other proof that this lid has
25 popped off same -- within the last five years?

1 work order, it would be -- should be in the system; is
2 that right?
3 A Yeah, that's correct.
4 Q Okay. And this is something you don't put -- if -- if
5 someone had called earlier that day or the day before
6 and said your -- your lid's missing off the -- off the
7 sys -- off that system, you wouldn't have any record of
8 whether they called or not?
9 MS. WEISS: Objection. It's not what.....
10 Q So does that make sense? I'll rephrase it if you want.
11 A Yeah, I'm not aware of anybody calling. That's --
12 that's all I can.....
13 Q Well, I know you're not aware of.....
14 A Okay.
15 Qbut you're not the only one who answers the phone
16 over there.....
17 A Right.
18 Qis that right? And when people call when they
19 have problems, not all problems come through to you; is
20 that right?
21 A Yeah, well, we don't track this activity. So.....
22 Q Okay.
23 Athe answer would be no.
24 Q Okay. That's -- that's fair to say.
25 A Okay.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ETHEL B. KELLY,)
)
 Plaintiff,)
)
 v.)
)
 MUNICIPALITY OF ANCHORAGE,)
)
 Defendant.)
) Case No. 3AN-08-4271 CI

AFFIDAVIT OF JAMEY W. GILMORE

STATE OF ALASKA)
)
)ss.
 THIRD JUDICIAL DISTRICT)

Jamey W. Gilmore, being first duly sworn, deposes and states as follows:

1. I am employed by Anchorage Water and Wastewater Utility ("AWWU"). I am one of two Superintendants of the Systems Maintenance section, which is within the Operations and Maintenance Division ("Division"). The Operations and Maintenance division provides preventative and corrective maintenance for all underground water distribution and wastewater collection facilities. I make the following statements of my personal knowledge.

2. I was deposed in this case on March 3, 2009. At my deposition, plaintiff's attorney asked me when the valve box had been worked on prior to May 22, 2006 and I stated that I did not believe it have ever been worked on but that I would have to check the records to be sure.

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 OF
 ANCHORAGE
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 MUNICIPAL ATTORNEY
 P.O. Box 196650
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 Facsimile: 343-4550

3. Since the deposition, I have had an opportunity to review the Division's computerized records. The Division keeps computerized records of its maintenance activity, including the location of any maintenance. Further, each valve has its own number so that the Division can determine what, if any, work has previously been done on a particular valve. The Division's records go back to 2001.

4. The Division has no record of ever having done corrective maintenance at the valve or having done any replacement of the valve cover located 3rd and "F" Street where Ms. Kelly fell prior to May 22, 2006.

5. In fact, a thorough search of the Division's records reveal that no one had any notice of a missing valve cover at the intersection where Ms. Kelly fell at any time prior to her fall.

DATED: 7-17-2009

Jamey W. Gilmore
Jamey W. Gilmore

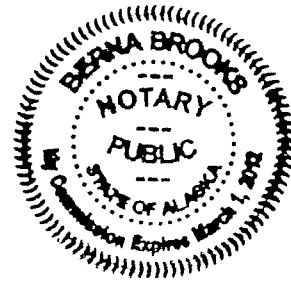
SUBSCRIBED and SWORN to before me this 17 day of July, 2009.

Berna Brooks
Notary Public in and for Alaska
My Commission Expires: 3/1/2012

Certificate of Service

I hereby certify that on this 21st day of July, 2009
I caused to be mailed a true and correct copy of the
foregoing to: Charles Coe

Jennifer Richardson
Jennifer Richardson, Legal Secretary
Municipal Attorney's Office



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Affidavit of J. Gilmore
Case No. 3AN-07-9375 CI
Page 2 of 2

Exhibit B
Page 2 of 2 000028

1 A Yes.

2 Q Really -- and in this particular case, after -- did you
3 look at the service order in this case that day after
4 he came back or did he just tell you about it?

5 A I did not see the service order that day. I just was
6 aware of the dispatch that day.

7 Q Okay. How -- was there any other dispatches as -- same
8 day dispatches that day; do you recall?

9 A For this site? No.

10 Q Okay. According to your -- okay. And have you done a
11 computer check of -- at this site about how many times
12 they've gone out to replace -- either replace the --
13 replace or place a valve cover on this particular site?

14 A That would be a Mr. Gilmore question on -- on -- from --
15 from his system, what he controls. I -- I have no
16 record of any dispatches through -- through my section.

17 Q Okay. Let me ask you. How -- how far back does your
18 system go? A couple of years or.....

19 A Our billing system goes back for -- back to the 80's.

20 Q Okay. That's the billing system; is that right?

21 A That's where the dispatches come out of.

22 Q Okay. Was this -- was this billed to anybody?

23 A No.

24 Q Okay. Would you be able to check your system to see
25 how many -- how many times lid covers were -- were

1 Q Saw the service order. Did you rec -- did you receive
2 the service order? In other words, how did your
3 division become aware of that?

4 A A call came into customer service. They wrote a
5 service order, contacted Mr. Wilber, he dispatched, and
6 the cover got put back on.

7 Q Where did the call -- okay, let's track this. Where
8 did the call come from?

9 MS. WEISS: Objection. Foundation.

10 A I can tell you what I saw in the service order.

11 Q Well, why don't you give -- you know, in another words,
12 I'm trying to line this out as.....

13 A Uh-huh. (Affirmative)

14 Qwho all the players are. Where the -- do you know
15 where the call was initiated from? Did it come from
16 the public, did it come from a security person, did it
17 come from another department?

18 A I'm not sure.

19 Q Okay. Who got -- who got the call? Which one of your
20 -- was it -- do you know which one of your.....

21 A Customer service rep.

22 Q Which customer -- it was a customer service rep?

23 A Uh-huh. (Affirmative)

24 Q And that would be someone who worked with Patty
25 Griffith?

Service Order Details

Service Order 148328

Status: Completed

Created By: WWDSC

Created Date: 22-MAY-2006

Need Date: 23-MAY-2006

Service Type: W33 - Repair Keybox

Account: 164228 - 550881

Customer Name: CP ANCHORAGE HOTEL II LLC

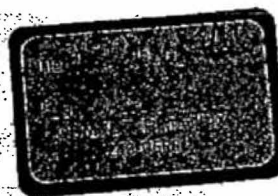
Service Address: 500 W 3RD AVE ANCHORAGE 99501-2210

Notes

5/22/06 per TC christine pw HERSES LYONS/HR OF HILTON, CBR 265-7181 FELL IN
 OF OUR 2 VALVE BOXES IN WHITE PAINT AREA OF E LANE OF 3RD AVE W OF E ST
 CHRISTINE OF PW ALREADY CONTACTED RISK MGMT, NEED COVERS REPLACED, DSG
 Put new lid in valve can #1230-031 GW

12-18-06 CLOSED. OXT

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ETHEL B. KELLY,)	
)	
Plaintiff,)	
)	
v.)	
)	
MUNICIPALITY OF ANCHORAGE,)	
)	
Defendant.)	
) Case No. 3AN-08-4271 CI

ORDER GRANTING SUMMARY JUDGMENT

Defendant the Municipality of Anchorage ("Municipality"), through the Municipal Attorney's Office, has moved for summary judgment pursuant to Alaska Rule of Civil Procedure 56 on all claims asserted against it. Having reviewed the Municipality's motion and memorandum and all exhibits and affidavits filed in support of that motion, and any opposition filed thereto:

IT IS HEREBY ORDERED that the Municipality's motion for summary judgment is GRANTED. Plaintiff's claims are hereby DISMISSED with prejudice.

DATED at Anchorage, Alaska this ____ day of _____, 2009.

By: _____
The Honorable Peter Michalski
Superior Court Judge

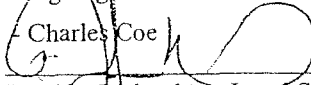
**MUNICIPALITY
OF
ANCHORAGE**

OFFICE OF THE
MUNICIPAL ATTORNEY

P.O. Box 196650
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99519-6650
Telephone: 343-4545
Facsimile: 343-4550

Certificate of Service

I hereby certify that on this 25th day of July, 2009
I caused to be mailed a true and correct copy of the
foregoing to:



Charles Coe
Jennifer Richardson, Legal Secretary
Municipal Attorney's Office

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ETHEL B. KELLY,)
)
 Plaintiff,)
)
 vs)
)
 MUNICIPALITY OF ANCHORAGE,)
)
 Defendant.)

Case No. 3AN-08-4271 CI

**OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, the plaintiff, ETHEL B. KELLY, by and through her attorney, CHARLES W. COE, who hereby opposes the defendant's motion for summary judgment and who hereby moves for summary judgment regarding several issues raised by the plaintiff. The plaintiff opposes the defendant's motion for summary judgment based on the fact that the defendant either created the hazard which caused plaintiff's injuries/damages and/or were on notice of this hazard and failed to correct it. The plaintiff also requests summary on the following issues:

1. As a matter of law plaintiff's foot stepped into an open valve box causing her to be injured.
2. As a matter of law the valve box lid cover was left open.

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3. As a matter of law defendant owned and maintained the valve boxes and lid covers on the valve box, subject of this lawsuit.

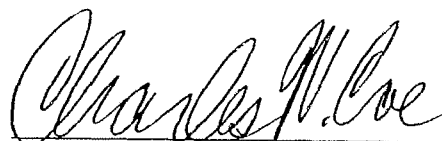
4. As a matter of law defendant was responsible for seeing that the valve box covers were kept on the valve boxes.

5. As a matter of law the defendant was negligent in allowing the valve box to remain uncovered resulting in plaintiff stepping in it and incurring injuries and damages.

This opposition and plaintiff's motion for summary judgment is supported by the picture of the uncovered valve box where plaintiff fell, attached memorandum of law, depositions of Jamey Gilmore and Robert Bennett, and affidavits of Charisse Lyons and Terri Wakefield.

DATED this 24th day of August, 2009.

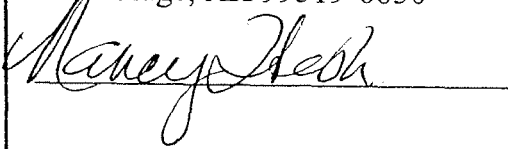
CHARLES W. COE
Attorney for Plaintiff



Charles W. Coe
ABA#7804002

I certify that on August 24, 2009,
I served a copy of the foregoing by
U.S. Mail upon:

Pamela D. Weiss
Assistant Municipal Attorney
Municipality of Anchorage
Office of the Municipal Attorney
PO Box 196650
Anchorage, AK 99519-6650



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Kelly v MOA
Opposition to Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment
Case No 3AN-08-4271 CI
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ETHEL B. KELLY,)
)
 Plaintiff,)
)
 vs)
)
 MUNICIPALITY OF ANCHORAGE,)
)
 Defendant.)

Case No. 3AN-08-4271 CI

**MEMORANDUM IN SUPPORT OF OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

Introduction

This is a personal injury case in which the plaintiff, Ethel Kelly, seriously injured her knee and leg when she stepped into an open unmarked valve box placed in the striped portion of the crosswalk at 3rd Avenue leading to the Anchorage Hilton Hotel (Exh. 1, Affidavit of Charisse Lyons, and Affidavit of Terri Wakefield). The defendant's motion for summary judgment and only defense is that the city did not know the valve box cover was open prior to plaintiff falling. They cannot dispute that she stepped into the open uncovered pipe box, that they owned and maintained this valve box and cover, and that they had a duty to place lids/covers back on valve boxes after they accessed the valve box, as well as a duty to insure that lids/covers were kept on these valve boxes.

Kelly v MOA

Memorandum in Support of Opposition to Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment

Case No 3AN-08-4271 CI

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The problem with the defendant's motion is that they try to prove that the city was unaware that the open valve box in which plaintiff was injured by submitting excerpts of depositions of only two municipal employees that state that they have no record of this valve box lid being missing prior to Ms. Kelly's injury. However, both of these employees, regardless of their positions, do not dispute that the city erroneously left this cover off while maintaining the crosswalk, that the city public works/maintenance crews drove over the uncovered box without stopping to cover it, or that the city was notified through other departments by the Hilton that the valve box cover was off prior to Ms. Kelly's fall. (Gilmore depo. at 11, 25, 33-34, 37-40, 45-46, 59-60, 63-65, 71-72, 77-78; Bennett depo. at 10-12, 17, 20-21, 66-67, 69-70, 82). It is clear from both of the defendant's witnesses that they can only say if their particular divisions of the city's public works department's office were contacted about a missing valve cover and a work order was generated to fix it. They cannot state that they record all contacts regarding missing covers nor can they eliminate the fact that this missing valve box cover was called into other divisions of the city and not acted on.

Summary judgment based on the defendant saying they have no record of a work order being generated to fix the cover prior to Ms. Kelly being injured should not be granted. In contrast, plaintiff's motion for summary judgment on

the facts is supported by a photograph, two affidavits, and deposition excerpts of both the defendant's employees in this case.

Standard of Review

Unlike federal court or other states, summary judgment motions denying a plaintiff the right to be heard at trial in this type of case are not normally granted. The Alaska Supreme Court has set up very restrictive standards on how such motion should be considered by the trial court. In fact, in the most recent case law the Alaska Supreme Court has consistently set aside a trial courts grant of summary judgment to non-moving parties, especially in negligence cases.

In considering a summary judgment motion, minimal evidence is necessary to overcome summary judgment. In Meyer v. State Department of Revenue, Child Support Enforcement Division ex re. N.G.T., 994 P .2d 365-367 (Alaska 1999) the court held that a putative father's sworn denial of paternity was enough to prevent summary judgment, even in the face of strong scientific evidence showing his paternity, because "any evidence sufficient to raise a genuine issue of material fact precludes a summary finding of paternity." In Alakayak v. British Columbia Packers, Ltd., 48 P .3d 432 (Alaska 2002), the court re-emphasized the minimal evidence needed to overcome summary judgment, indicating that a "genuine issue " of material fact [exists] as long as the non-movant has presented some evidence in support of its legal theory. Id. at 12. This low threshold was again re-affirmed in John's Heating Service v. Lamb, 46 P. 3d 1024 (Alaska 2002).

In considering granting a motion for summary judgment to a moving party, the trial court must consider whether the moving party has ever presented a prima

Kelly v MOA

Memorandum in Support of Opposition to Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment

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facie case that they are entitled to summary judgment based on established facts Himschoot v. Dushi, 953 P .2d 507 (Alaska 1998). Assuming this can be done, the moving party must show an absence of genuine issues of material facts Prebich v. Zorea 996 P .2d 730 (Alaska 2000). At all times all reasonable inferences regarding questions of fact must be considered in favor of the non-moving party Wilson v. Municipality of Anchorage 977 P .2d 713 (Alaska 1999). The trial court is prohibited from weighing credibility of the various parties or witnesses Meyer v. State supra. Likewise, the non-moving party can submit minimal evidence to defeat such a motion Meyer v. State, supra, and they do not need to produce all of the evidence that they would rely on at trial Shade v. Co., & Anglo Alaska Service Corp., 901 P .2d 434 (Alaska 1995); Alakayak v. British Columbia Packers, Ltd., supra. In contrast, the moving party has the entire burden of showing that his opponent's case has no merit and they must negate each of the non –moving parties' claims Barry v. University of Alaska, 85 P .3d 1022 (Alaska 2004); Odsather v. Richardson, 96 P .3d 521 (Alaska 2004).

Facts

On May 22, 2006, the plaintiff, Ethel Kelly, was crossing 3rd Avenue at her place of employment, the Anchorage Hilton, with a co-worker, Terri Wakefield (See complaint, Wakefield affidavit). As they walked Ms. Kelly's foot fell into an unmarked uncovered pipe hole, also referred to as a valve box. (Wakefield affidavit; Exh. 1).

Prior to Ms. Kelly being injured, this area was being maintained or worked on by the city. A cone was placed on this area but after it was removed, the valve box was left open without a cover or marking for several days before Ms. Kelly was

Kelly v MOA

Memorandum in Support of Opposition to Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment

Case No 3AN-08-4271 CI

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inured. (Wakefield affidavit). Another Hilton employee, Charisse Lyons, stepped into this hole prior to Ms. Kelly and the city was contacted by the Hilton. (Lyons affidavit, Bennett depo. at 47-50).

Employees of the defendant at deposition admitted that the city was responsible for keeping lids on valve boxes. (Bennett depo. at 18-21). This was done to both protect the valve box and for the safety of the public. (Gilmore depo. at 13). Additionally, they testified that if a lid was taken off or missing, it would be below the standards of care to leave it off. (Bennett depo. at 14-15; Gilmore depo. at 22-23). The city has no program to inspect for missing covers. (Gilmore depo. at 10-11). Also, if they receive a report of a missing lid, they can replace it within 15-20 minutes. (Gilmore depo. at 67).

Argument

I. Defendant's Motion for Summary Judgment Should be Denied

As stated in the introduction, there are genuine disputes of fact which require that the defendant's motion be denied. It is based on the premise that if Jamey Gilmore's department and Robert Bennett's department do not have a work order for replacing the valve lid in their system, then the city was not on notice and had no responsibility for plaintiff's injury.

The defendant's managers testified that their systems only show work orders from their departments, not calls into their departments. (Gilmore depo. at 66-70) A call into the department does not always result in a work order to fix the

situation and notice of a lid off are not always recorded. (Gilmore depo. at 70-71). Second, not all lid off calls come into these departments. Sometimes call go to street maintenance, the police, engineering, etc., and are not necessarily routed to their departments. (Gilmore depo. at 25, 37-38). In fact, the call in this case actually went to street maintenance. (Bennett depo. at 49-50). Third, plaintiff argues that this valve box cover was left off by maintenance crews working on the crosswalk. (Wakefield affidavit; Gilmore depo. at 42-45). Fourth, Wakefield and Lyons affidavits state that the lid off condition existed before Ms. Kelly's injury and the city was notified or should have known about it due to the length of time it was left off. Finally, it would be almost impossible to imagine that this uncovered valve could go unnoticed on 3rd Avenue and F Street considering the number of police vehicles, street maintenance, buses, and municipal vehicles that travel over that area every hour of the day.

Actual or constructive notice of a dangerous road condition is necessary unless the government entity itself created the dangerous condition. Notice can be "relevant, and necessary, when the dangerous condition is not caused by the municipality. Johnson v. State, 636 P.2d 47, 52 (Alaska 1981). In such a case, the plaintiff must establish either actual or constructive notice. The defendant cites to the affidavit of two AWWU employees in their motion as proof that the municipality had neither actual nor constructive notice of the missing valve box

Kelly v MOA
Memorandum in Support of Opposition to Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment
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cover. However, the municipality did have actual notice of the dangerous condition in this case since they created the condition according to Terri Wakefield and since they were put on notice prior to Ms. Kelly's injury. (Wakefield affidavit).

Even if the affidavits of Wakefield and Lyons do not support that the city had actual notice, constructive notice can result if a dangerous condition exists for such a period of time prior to the accident, and is of such an obvious nature, that the defendant public entity, in the exercise of due care, should have discovered the condition and its dangerous character." Johnson v. State. Id. at 52-53. Lyons' and Wakefield's testimony could lead reasonable jurors to conclude that the municipality and AWWU were made aware of the missing valve cover prior to the plaintiff's fall, or to find that the missing lid cover had been missing for a sufficient amount of time so as the municipality had constructive notice of this dangerous condition. Both Jamey Gilmore and Robert Wayne Bennett, supervisors for AWWU, testified that the customs and practices of their department for discovering/repairing valve box lids or being notified of them by other department is erratic at best, and insufficient to provide proper notice to the city when the valve box lids are missing. This situation creates a dangerous hazard for which the city could be found to have constructive notice. As laid out in

Edenshaw v. Safeway, Inc., *supra*, the issue of notice is one that must be left to the trier of fact, and defendant's motion for summary judgment should be denied.

II. Plaintiff should be granted Summary Judgment

Plaintiff raises several undisputed issues for which summary judgment should be granted. First, it is undisputed that plaintiff stepped into an uncovered valve box and was injured. Second, it is undisputed that the city owned and maintained the valve box and its lid. Third, it is undisputed that if the city left this lid off or were notified about it, they would be responsible for putting a lid back on the valve box. Fourth, it is undisputed that the lid for this valve box was off.

Finally, plaintiff submits proof that the city either left the lid off during maintenance of that area or that they were on notice that it was off prior to plaintiff being injured. The testimony of Gilmore and Bennett is that they had no work orders for repairing this box prior to plaintiff being injured. However, they do not testify that there were no call-ins regarding this condition prior to plaintiff being injured.

Based on these undisputed facts supported by the affidavits, photograph, and deposition testimony, summary judgment on these issues should be granted.

Conclusion

The defendant's motion for summary judgment in this case should be denied since they cannot prove that they were not notified of this condition.

Kelly v MOA

Memorandum in Support of Opposition to Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment

Case No 3AN-08-4271 CI

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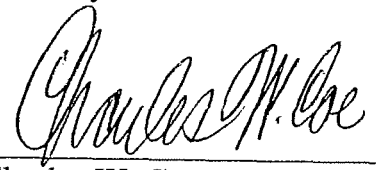
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Additionally, there is evidence that this hazard was created by the city and the city had notice that the lid was off.

The plaintiff maintains that there are undisputed issues of fact in this case. This requires that summary judgment should be granted to the plaintiff on the issues raised in her motion.

DATED this 24th day of August, 2009.

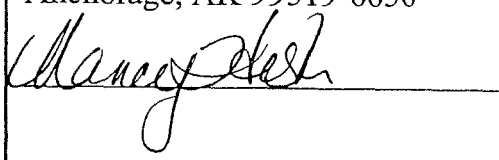
CHARLES W. COE
Attorney for Plaintiff



Charles W. Coe
ABA#7804002

I certify that on August 24, 2009,
I served a copy of the foregoing by
U.S. Mail upon:

Pamela D. Weiss
Assistant Municipal Attorney
Municipality of Anchorage
Office of the Municipal Attorney
PO Box 196650
Anchorage, AK 99519-6650



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ETHEL B. KELLY,)

Plaintiff,)

vs)

MUNICIPALITY OF ANCHORAGE,)

Defendant.)

Case No. 3AN-08-4271 CI

ORDER

IT IS HEREBY ORDERED that;

1. The defendant's motion for summary judgment dismissing plaintiff case is denied.

2. The plaintiff's motion for summary judgment on the following issues is granted and as a matter of law, the court finds:

A. On May 22, 2006, plaintiff stepped into an open valve box causing her to be injured;

B. Defendant owned and maintained the valve box and its lid, subject of plaintiff's lawsuit;

C. Defendant owed a duty to see that lids were placed on these valve boxes when they were not being used to access the valve box; and

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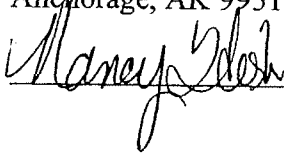
D. The defendant breached this duty either by leaving the lid off the valve box or failing to place a lid back on this valve box resulting in the plaintiff stepping into it causing her to injuries.

DATED this _____ day of August, 2009.

Superior Court Judge

I certify that on August 24, 2009,
I served a copy of the foregoing by
Mail upon:

Pamela D. Weiss
Assistant Municipal Attorney
Municipality of Anchorage
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