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STATE OF ALASKA
APPELLATE COURTS

IN THE SUPREME COURT FOR THE STATE OF ALASKA

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CLERK, APPELLATE COURTS

ETHEL B. KELLY,)
)
 Appellant,)
)
 v.)
)
 MUNICIPALITY OF ANCHORAGE,)
) Supreme Court Case No. S-13858
 Appellee.)
) (Superior Court Case No. 3AN-08-4271 CI)

BY: _____
DEPUTY CLERK

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

APPELLEE'S EXCERPT OF RECORD
VOLUME 1 OF 1

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Filed in the Supreme Court of the State
of Alaska this 23 day of November, 2010.
CLERK OF COURTS

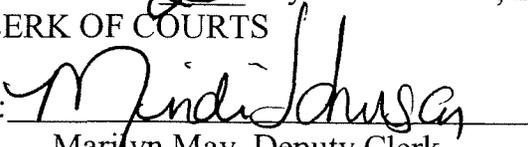
By: 
Marilyn May, Deputy Clerk

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1 even if they were assumed -- even if those folks were municipal
2 workers, the fact is that no one ever said that they saw a lid
3 on this box, then the municipal workers came in, and then the
4 lid was missing. They weren't even sure there were municipal
5 workers, and no one could pinpoint what they were doing or when
6 it was. So since there's no evidence to establish that the
7 Municipality caused the hazard, then plaintiff has to establish
8 that the Municipality had notice, and with respect to actual
9 notice not one of plaintiff's witnesses can say that they called
10 the Municipality or that they observed somebody else call the
11 Municipality.

12 All of their conclusions are based on their assumption
13 that somebody else called or their supposition that somebody
14 else called, but those types of things do not make plaintiff's
15 case, and certainly don't avoid summary judgment, and given the
16 evidence that's been presented by plaintiff, or I should say the
17 lack thereof, no fact finder could conclude that the
18 Municipality was given notice of the hazard, and that's the case
19 even if we don't consider the statements made by the
20 Municipality's witnesses, that is, Mr. Jamie Gilmore and
21 Mr. Bennett, that their -- who work for AWUU, which is Anchorage
22 Water & Wastewater Utility - even if we take out their
23 statements that they've reviewed the records and they have no
24 evidence that anybody ever called, even if that's disregarded
25 there's not enough evidence to show the Municipality received

1 done it, I don't recall exactly doing it, or other Mr. John
2 would have done, that was our protocol to do it, I do remember
3 Ms. Lyons saying it was done.

4 Now, what's interesting about the City's case in that
5 regard is they don't have an affidavit from the right person
6 saying we didn't get a call. What they have is the public works
7 people come in and say, well, you know, we didn't know about it,
8 but, then again, when you take their deposition, and we have the
9 citations to their deposition, they candidly admit that they
10 don't always get those calls, and sometimes what will happen, a
11 dispatcher will get the call and they don't always annotate the
12 call, someone will be in the area and they'll just say it's left
13 open, would you go do it. They don't annotate all the calls
14 they get it concerning valve box covers. What they're saying is
15 that the only document of valve box cover they have in that area
16 was the day Ms. Kelly fell.

17 Then again they say, well, we sent -- we normally send
18 someone out within 15 to 20 minutes. We have proof that they
19 waited until 3:00 o'clock in the morning to send -- 2:00 or 3:00
20 o'clock in the morning to send someone out because that's when
21 the security people at the Hilton, their records show --
22 according to their records, and they were monitoring the hole,
23 that the people didn't come out in a timely manner even then
24 when they knew about Ms. Kelly's fall. They didn't -- they
25 still didn't come out in a timely manner and fix that hole.

1 working in that area, you do have them painting cross-walks, and
2 you do have -- a city worker could have taken at different times
3 taken and let off the hole, left it open against their rules and
4 left it that way, and we have people that verify that that did
5 happen. Mr. Griffin says the -- before Ms. Kelly before and
6 after Ms. Lyons fell I saw at least one occasion where they left
7 that hole open, and he said and on other occasions where they
8 would leave the cover off the hole and then they -- you know,
9 I'd see it on other occasions after that, including after she
10 fell, it was left open on several occasions afterwards.

11 So I think two things. We'd ask that summary judgment be
12 granted in our favor, Your Honor, at a minimum on the issues
13 that are undisputed, and the second thing is that we feel that
14 we've established enough of or people to say something was out
15 there working on behalf of the City, left the hole open, and
16 they were either called about it before -- after Ms. Lyons falls
17 and notified about it or before Ms. Kelly fell there was people
18 in that area working leaving -- who had left the hole open. The
19 City in their affidavits provide no other person that was
20 working out there other than City people, and Mr. Blanchart
21 throughout -- Mr. Blanchart indicates they were working out
22 there in May of there about -- he doesn't say exactly when it
23 was in May, but he does indicate they were working there in May
24 of that year, at least on the other cross-walks in that area,
25 and when I say cross-walks in the area we're talking about Third

1 not the Municipality caused the cell (ph) cover to be missing or
2 had notice of it, and there's certainly no evidence that the
3 Municipality left it open.

4 I really think that most of the stuff in the appropriate
5 citations to the record are laid out in the parties' briefing.
6 I'm certainly happy to answer any questions that the Court may
7 have that may be hanging out there, and I -- the last point,
8 though, I do want to make when he talked about that we haven't
9 put forward an affidavit of street maintenances, I would say for
10 purposes of this motion that all of our evidence could probably
11 be discounted and there still is not sufficient basis for
12 granting plaintiff summary judgment or showing that that somehow
13 undoes our right to summary judgment. So whether or not we put
14 forward an affidavit of street maintenance, we could do that,
15 but it's not relevant since there's no evidence by plaintiff
16 that a call was even made, so even if we put forward an
17 affidavit by street maintenance, we're really just in the exact
18 same place that we were before. That's it.

19 MR. COE: Let me read page 32. Do you have that in front
20 of you, Your Honor?

21 THE COURT: Well, I'll listen to you.

22 MR. COE: What's that?

23 THE COURT: I'm listening.

24 MR. COE: Here's what Mr. Griffin -- I already read
25 about.....

1 walk -- the direct cross-walk is from the Woodshed over to the
2 hotel.

3 THE COURT: So it's in the eastern walk or it's in the
4 western walk?

5 MR. COE: Well, we've had -- they describe it as the
6 western walk. I don't know if it's considered it as the east or
7 the west. We've had.....

8 THE COURT: Well.....

9 MR. COE:people describe it as the west one.

10 THE COURT: The one that comes across from the parking
11 would be on the western side, wouldn't it, over by the -- going
12 over to the federal side?

13 MR. COE: It is towards the federal side, and we've
14 had.....

15 THE COURT: Then you got the side that's toward the hotel.

16 MR. COE: Right.

17 THE COURT: And that would be the eastern side. So is it
18 in the eastern or the western side?

19 MR. COE: It would be the side towards the federal side.

20 THE COURT: Okay, so the western side of.....

21 MR. COE: If that's what the -- if that's why -- if you're
22 going from west to east.....

23 THE COURT: So it's not immediately across from the hotel.
24 It's across from the federal side of the street.

25 MR. COE: It's immediately across from the hotel's parking

1 lot where the.....

2 THE COURT: No, no, I understand that. I'm just saying
3 it's by the federal building.

4 MR. COE: Yes.

5 THE COURT: Yeah, so -- and you don't know whether there's
6 any kind of construction or anything going on in the parking lot
7 or anyplace else that would involve cones and jackhammers, any
8 of that stuff.

9 MR. COE: No, we -- the only thing we know is that someone
10 was doing it on the -- what we know is -- we don't know of any
11 construction firms that was out there, we haven't eliminated
12 construction firms being out there. All we know is that there
13 was painting going on at one point in May and that -- and over
14 that time period because they admit to that. We do not know
15 that what Mr. Griffin and our people said is they were working
16 on that cross-walk.

17 THE COURT: And you think from that thinking it in the
18 light most favorable and all the inferences in favor of the
19 nonmoving party that that calls for denying the motion to grant
20 summary judgment.

21 MR. COE: Yes, I mean, for.....

22 THE COURT: And do you think -- and you think that, of
23 course, I have to take all the inferences the other way to
24 cross.....

25 MR. COE: We felt that we should be granted summary

1 judgment because we -- if you take the inferences our way we
2 have people that say.....

3 THE COURT: Well, I have to take the inferences the other
4 way for the -- for your motion.

5 MR. COE: Okay. I'm sorry, Your Honor.

6 THE COURT: I have to -- for the cross-motion I have to
7 take the inferences the other way.

8 MR. COE: Yeah, the other way. If you take the inferences
9 the other way, then we feel that we've presented credible
10 evidence that, number one, that the hole was open, and there's
11 no question about Ms. Kelly's part of it, we -- we've dealt with
12 that, all that issue of what happened to her in the hole and all
13 that. That was -- there was no question. They didn't find the
14 cap. No question of the standard of care.

15 Let's go to the real basic, is we feel that Mr. --
16 Ms. Lyons said that there was a hole open. Mr. Griffin
17 acknowledged there was a hole open. Mr. Griffin said that their
18 protocol was to call the City. They had no reason to believe
19 that the City was not called. In addition to that then we also
20 have Mr. Griffin's observations of what he maintained was city
21 workers working in that area. We have Ms. Wakefield and
22 Ms. Lyons saying the same thing.

23 THE COURT: Okay.

24 MR. COE: And that's why we feel.....

25 THE COURT: Let me inquire of Ms. Weiss whether she wants