IN THE SUPREME COURT FOR THE STATE OF ALASKA

ETHEL B. KELLY,

Appellant,

v.

MUNICIPALITY OF ANCHORAGE,

Appellee.

Supreme Court Case No. S-13858

(Superior Court Case No. 3AN-08-4271 CI)

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

BRIEF OF APPELLEE

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Alaska Rule of Civil Procedure 56(e). Summary Judgment

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e) Form of Affidavits - Further Testimony - Defense Required. Supporting and opposing affidavits 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. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

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STATEMENT OF THE ISSUES

The sole issue before this Court is the existence of a genuine issue of material fact as to whether the Municipality had notice of a dangerous condition, but failed to act, or the Municipality itself caused the condition. Despite plaintiff's repeated assertion to the contrary, she failed ever to put forth specific facts demonstrating she has evidence to establish this critical element of her case. As she did in the trial court, in her Brief to this Court she selectively references portions of affidavits that have now been disclaimed or clarified in depositions and characterizes witness statements to fit her theory of the case. When the record is actually reviewed, however, it becomes clear that she lacks sufficient evidence to establish the notice element and therefore summary judgment was proper.

STATEMENT OF THE CASE

The Municipality and plaintiff agree on the most basic facts. On May 22, 2006, plaintiff fell as she left her place of employment, the Hilton hotel. [Exc. 2] It happened when she stepped into an open valve box assembly located in downtown Anchorage, in or near the crosswalk on the west side of the intersection of 3rd Avenue and F Street. [Exc. 2, 229-230] The Municipality has never disputed that the lid to the valve box assembly was missing. Indeed, it was missing when Anchorage Water and Wastewater Utility ("AWWU") personnel arrived at the location following notification of the missing

lid and Ms. Kelly's accident. [Exc. 71][1] Finally, the Municipality has never disputed that another Hilton employee, Ms. Charisse Lyons, stepped into the very same hole approximately a week prior to Ms. Kelly's incident, but apparently was not injured. [Exc. 118, 147]

I. Factual Background

The "hole" that Ms. Kelly stepped in on May 22, 2006 was an open valve box assembly pipe. Valve box assemblies sit atop valves in the water system's below-ground water main to enable AWWU to access the main line in the event it needs to shut off the valve. [Exc. 15, 19] There are approximately 30,000 valve boxes throughout the city. [Exc. 22]

The portion of the assembly visible from the street is the lid cap, which is approximately ¾"-1" tall and sits atop the valve box assembly pipe. [Exc. 17-18] Both the pipe and the lid cap are approximately 5-6" in diameter. [Exc. 16] The lids are not screwed on or clamped down. Rather, their weight keeps them from coming off. [Exc. 17, 18, 23] Nevertheless, lids do come off on rare occasions 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. [Exc. 23-25, 116]

Aside from the agreed upon facts noted above, plaintiff's rendition of the "facts" is, at best, incomplete, and at worst, disingenuous in light of the record. In many cases,

[1] There is apparently some dispute about how long it took for AWWU to come and replace the cover. Plaintiff alleges it took until 3 a.m. *See* [Exc. 226]. The Municipality disputes this, but because how long it took after Ms. Kelly's fall does not have any bearing on the issues before the Court, the record on this point is not developed. *See* [Exc. 30, 31].

the asserted "fact" is not supported by the record. Plaintiff's statement of the case, and in particular the statement of facts, suffers from the same problem found in the briefing to the superior court. In other cases, the "fact" represented by plaintiff as such selectively ignores deposition testimony that clarifies, or in some cases discredits, a statement in the affidavit. A discussion of specific examples of such instances is reserved for the Argument section of the brief.

II. Procedural Background

The Municipality also agrees with plaintiff's general rendition of the procedural background of the case. However, plaintiff omitted some relevant events regarding the motion practice and discovery.

At no time during discovery did plaintiff provide any evidence that the Municipality had notice of the missing valve lid before the incident or that the Municipality caused the condition. Accordingly, on July 21, 2009, the Municipality filed a motion for summary judgment. [Exc. 9-14] When plaintiff filed her opposition and cross-motion on August 24, 2009 [Exc. 33-44], she filed affidavits from two other Hilton employees: one from Ms. Lyons [Exc. 34-35] and another from Ms. Terri Wakefield. [Exc. 48-51]

The Municipality subsequently deposed Ms. Lyons and Ms. Wakefield. The depositions revealed that, in fact, neither Ms. Wakefield nor Ms. Lyons had personal knowledge that the missing lid was ever reported to the Municipality or that the Municipality itself had caused the lid to be missing. [Exc. 91-94] Thus, the Municipality

filed its Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply. [Exc. 87-97]

On November 25, 2009, four months after the Municipality filed its original motion, plaintiff filed her Reply in support of her Cross-Motion for Summary Judgment. [Exc. 134-142] Attached to it was the affidavit of James Griffin, a security guard employed at the Hilton hotel whose name had never previously been disclosed. [Exc. 143-145] Like the affidavits of Ms. Lyons [Exc. 34-35] and Ms. Wakefield [Exc. 48-51], Mr. Griffin's affidavit appeared in vague terms to suggest that the open valve pipe had been reported to the city prior to the incident. [Exc. 144] And as was the case for Ms. Wakefield and Ms. Lyons, Mr. Griffin's deposition revealed that, in fact, he too had no first hand knowledge that the Municipality had been given notice of the missing valve cover or had caused the lid to become missing.[2] [Exc. 185-189] Rather, the statements in his affidavit reflected suppositions and "assumptions." [Exc. 191-194]

The court held oral argument on March 22, 2010. At oral argument, plaintiff's counsel continued to assert, as he does here, that the affidavits presented demonstrate there are genuine issues of material fact. [Exc. 227, 231] Because of plaintiff's repeated references to Mr. Griffin's statements as support for her arguments, the court requested a

[2] The Municipality deposed Mr. Griffin with leave from the court after the court rejected the Municipality's Motion to Strike. The Municipality moved to strike on the basis that plaintiff failed to disclose Mr. Griffin at any point throughout the discovery process. Indeed, the only witnesses relating to the incident itself (as opposed to injures and damages) in Plaintiff's witness list were Ms. Kelly, Ms. Wakefield, and Ms. Lyons. *See Prelim Witness List* (8/31/09). A supplemental witness list filed on September 3, 2009 simply added two friends who could testify about her condition before and after the fall. *See Suppl Witness List* (9/3/09).

complete copy of the transcript of the deposition. [Exc. 214] On March 30, 2010, five days after submission of the transcript, the court issued an order granting the Municipality's motion for summary judgment. [Exc. 215] This appeal followed.

STANDARD OF REVIEW

When reviewing a grant of summary judgment this court applies "a de novo standard of review, adopting the rule of law that is most persuasive in light of precedent, reason, and policy."[3] It will affirm a grant of summary judgment "if the evidence in the record fails to disclose a genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[4] "[A]ppellate review of a grant of summary judgment is limited to the evidence that was before the superior court when it rendered its decision."[5]

Summary judgment is appropriate only where the record shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[6] The moving party has the initial burden of showing admissible evidence that there is an absence of genuine factual dispute and that it is entitled to judgment.[7] Once the moving party satisfies its burden, the non-moving party must produce "admissible evidence reasonably tending to dispute or contradict the movant's evidence" in order to avoid summary judgment.[8] The non-moving party may not "rest upon mere allegations, but

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[3] *Sea Hawk Seafoods, Inc. v. State*, 215 P.3d 333, 336 (Alaska 2009).
[4] *Id.*
[5] *Peterson v. State, Dep't of Natural Resources*, 236 P.3d 355, 362 (Alaska 2010) (citation omitted).
[6] *Odsather v. Richardson*, 96 P.3d 521, 523 n.2 (Alaska 2004).
[7] *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).
[8] *Id.* (citation omitted).

must set forth specific facts showing that there is a genuine issue of material fact."[9] "To create a genuine issue of material fact there must be more than a scintilla of contrary evidence."[10] The evidence in support of, or in opposition to, summary judgment must be admissible under the Alaska Rules of Evidence.[11]

ARGUMENT

I. Plaintiff Fails to Show that Genuine Issues of Material Fact Exist Because She Lacks Any Evidence to Establish a Critical Element of Her Case.

Plaintiff's entire claim that there are disputed issues of fact is built on mischaracterization of what the witnesses actually said. And in the few instances where a witness said something that might, at first glance, appear to be helpful to her case, once that vague statement is explored more fully, it becomes evident that they lack any personal knowledge of the point alluded to in their affidavit. In view of plaintiff's failure ever to provide specific evidence that the Municipality either had notice of the missing lid or caused the lid to become missing, the trial court properly granted summary judgment to the Municipality.

A. Plaintiff Failed to Provide Any Evidence that the Municipality Caused the Dangerous Condition.

Johnson v. State requires that in order to prevail in her claim against the Municipality, plaintiff show the Municipality caused the dangerous condition about

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[9] *Id.* (citation omitted).
[10] *Id.* (citation omitted).
[11] Alaska R. Civ. P. 56(e); *Murat v. F/V Shelikof Strait*, 793 P.2d 69, 74-75 (Alaska 1990).

which she complains.[12] Plaintiff argues that summary judgment should not have been granted because there was evidence the Municipality caused the lid to be missing from the valve box. Appellant's Brief ("Br.") at 2, 3, 7. However, the only evidence plaintiff ever presented was the affidavits of Ms. Wakefield [Exc. 48-51], Ms. Lyons [Exc. 34-35] and Mr. Griffin [Exc. 143-145]. And not one of these affiants provided specific facts based on personal knowledge that the Municipality caused the condition.

First, the statements in the affidavits of plaintiff's witnesses are incredibly vague. Further, their deposition testimony establishes they lack any personal knowledge of specific facts. Ms. Wakefield, for example, states in her affidavit:

> [p]rior to Ms. Kelly's fall, based on my observations as I walked in this area when I went to and from work, the lid for this pipe hole was removed when the city painted this crosswalk or performed maintenance in this area. The city maintenance crew put cones over the hole or near the hole for a period of time. After the cones were removed they left the hole in the crosswalk without putting a lid cover or marking on the hole.

[Exc. 49] But at her deposition she was unable to say when any painting took place, exactly who did painting or where the cones were placed. [Exc. 127-130] Indeed, she confirmed she did not even see the hole until the day of Ms. Kelly's accident. [Exc. 130, 132] Thus, Ms. Wakefield's statements do not create an issue of fact as to whether the Municipality (or anyone else for that matter) caused the lid to be missing.

Ms. Lyons also cannot provide evidence to establish this critical element. Ms. Lyons does not address in her affidavit who or what may have caused the lid to be

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[12] 636 P.2d 47, 52 (Alaska 1981). In the superior court plaintiff agreed this standard applied. [Exc. 41-42] And given the arguments in the Brief, it seems clear that she continues to agree the requirement in *Johnson* applies.

missing. *See* [Exc. 34-35]. Further, her deposition testimony fails to raise a genuine issue of fact as to whether the Municipality caused the condition. Ms. Lyons did say she recalled some workers "in the area" nearby but she was also sure they were not in the crosswalk. [Exc. 121] Other than that vague statement, she testified that she did not know exactly where they were, who they were, or what they were doing. [Exc. 121-122, 124][13]

Nothing is different in the case of Mr. Griffin. In his affidavit, he stated in vague, non-specific terms only that: "Prior to Ms. Kelly's injury, I also observed city maintenance workers leave a cone on top of the uncovered valve box at the cross walk where she fell." [Exc. 144] But when asked about this at his deposition he conceded he did not know they were municipal workers but instead simply "assumed" they were. [Exc. 193, 194] In fact, he did not even recall what they were doing. [Exc. 193, 194] More important, he cannot link the work to the missing cover since the first time he saw there was no cover was after Ms. Lyons brought it to his attention, about a week before Ms. Kelly's accident. [Exc. 195]

"Mere assertions of fact and unsubstantiated suppositions are not enough to overcome a motion for summary judgment."[14] In addition, affidavits must be based on

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[13] Nor was it entirely clear what time frame she was talking about these workers being in the area. *See* [Exc. 121].

[14] *Morgan v. Fortis Benefits Ins. Co.*, 107 P.3d 267, 271 (Alaska 2005) (concluding summary judgment appropriate where plaintiff lacked admissible evidence of an alternative cause for the accident).

personal knowledge.[15] For the reasons discussed above, the "evidence" that plaintiff brings forth does not suffice to show that a material issue of fact exists.[16]

B. Plaintiff Failed to Provide Any Evidence that the Municipality Had Actual Notice of the Missing Lid.

In the absence of evidence that the Municipality caused the valve assembly lid to become missing, plaintiff must establish that the Municipality had notice it was missing prior to Ms. Kelly's accident.[17] Such notice can be actual or constructive.[18]

Plaintiff claims that the court erred in not "accepting" that plaintiff had provided evidence that the Municipality had notice of the missing valve box cover. Br. at 10. Plaintiff argues that her witnesses' statements show the Municipality had actual notice. *See* Br. at 11 (asserting that the security staff reported the condition to the Municipality after Ms. Lyons told them of her tripping in the open valve box approximately a week prior to Ms. Kelly's accident). However, the statements plaintiff relies upon are inadequate to establish there is any issue of fact as to actual notice.

For example, plaintiff points to Ms. Lyons' statement that it was the responsibility of the Hilton security department to report the condition. *See* Br. at 11; (citing [Exc.

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[15] *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1215 (Alaska 1991).

[16] *Preblich v. Zorea*, 996 P.2d 730 (Alaska 2000); *Meyer v State, Dep't of Revenue,* 994 P.2d 365, 368 (Alaska 1999) (sworn denial of sexual intercourse raised issue of fact concerning paternity; it is more than a scintilla because he would have personal knowledge); *see also Finch v. Greatland Foods, Inc.*, 21 P.3d 1282, 1286 (Alaska 2001) (plaintiff presented detailed accounts of four incidents to support the claim of constructive discharge).

[17] *See Johnson*, 636 P.2d at 52; *Beck v. State, Dep't of Transp. & Pub. Facilities*, 837 P.2d 105, 144 (Alaska 1992) (citing *Johnson*).

[18] *Johnson*, 632 P.2d at 52.

156]). But whatever Ms. Lyons may have expected of the security staff does not establish that notice was ever given to the Municipality. Further, plaintiff points to Ms. Lyons' statement that security informed her they were "taking care of it." Br. at 11 (citing [Exc. 156]). Again, assuming they did tell her that, nothing in security's statement to her demonstrates they actually called the Municipality. Ultimately, Ms. Lyons said at her deposition that she did not call the Municipality and she was not sure that security did it either. [Exc. 119-120]

Plaintiff's other witnesses also have no personal knowledge that the Municipality had actual knowledge of the missing lid. Ms. Wakefield stated she did not report the condition to the Municipality herself, and that she did not know who or if anyone else did. [Exc. 173] In fact, she had not even seen the hole until the day Ms. Kelly fell. [Exc. 173] And despite plaintiff's assertion that "[the condition] was reported by [Mr. Griffin's] department before Ms. Kelly fell," Br. at 11, 12 (citing [Exc. 143-144]), Mr. Griffin repeatedly stated at his deposition that he had *absolutely no* recollection of calling the Municipality. [Exc. 191] ("I don't remember actually making the call that day"); [Exc. 192] ("I'm assuming it was done but I don't remember actually making the –being the one to make the call"); [Exc. 199] ("I've been stressing myself trying to figure out why I can't remember making the phone call..."); [Exc. 201] ("I can't remember actually making that phone call"). Nor did he know whether the other security guard called the Municipality. [Exc. 198] ("If Doug made the call, I wasn't in the room"). Apparently he just "assumed" it was done. [Exc. 191] ("I'm assuming it got done by - by Doug John").

But assumptions and suppositions are insufficient to create an issue of fact.[19] Thus, plaintiff fails to show she has any evidence to show actual notice.

C. Plaintiff Also Failed to Provide Any Evidence that the Municipality Had Constructive Notice of the Missing Lid.

Plaintiff also claims that the affidavits of Ms. Wakefield and Ms. Lyons establish that the Municipality had constructive notice. Br. at 10. "[C]onstructive 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."[20] However, plaintiff's claim that her witnesses' testimony demonstrates constructive notice completely overlooks what their affidavits and deposition testimony actually say.

In fact, nothing in any of the witnesses' testimony provides sufficient evidence that the condition was in existence for any length of time. Ms. Wakefield did not even see the hole until the day Ms. Kelly fell. [Exc. 173] Ms. Lyons, for her part, only first noticed the hole a few days or perhaps a week before Ms. Kelly's accident, when she allegedly tripped in it herself. [Exc. 155, 156] In light of the case law concerning constructive notice, a week is insufficient to support a claim of constructive notice. Indeed, in *Johnson*, the condition complained of had been in existence for four years.[21]

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[19] *Morgan*, 107 P.3d at 271; *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 661 (Alaska 2006) (assumptions are insufficient to create an issue of fact).
[20] *Johnson*, 636 P.2d at 52.
[21] *Id.* at 50.

And the cases *Johnson* relies on regarding constructive notice all involve conditions that existed for long periods of time, in many cases years.[22]

But even if one week were "such a period of time," plaintiff also lacks any evidence of the other essential requirement for constructive notice – that the condition was "of such an obvious nature." The hole Ms. Kelly tripped in was a 5-6" opening at street level. [Exc. 100] And the only evidence plaintiff provided regarding the visibility of the hole was that it was actually quite difficult to see. [Exc. 148] (Ms. Lyons' Affidavit stating "[t]he hole was difficult to see and observe as you walked due to its location"); [Exc. 120] (Ms. Lyons' statements at her deposition that "it was in a location where, if you weren't paying attention, if you were running across, you would fall into it"); [Exc. 133] ("it was not easily visible"); [Exc. 197] (Mr. Griffin's statement at deposition that "you couldn't really see this hole 'til you walk up on it").

II. The Trial Court Properly Granted Summary Judgment to the Municipality and Denied Plaintiff's Cross-Motion.

Throughout the Brief, plaintiff makes a number of points about why the evidence she provided is sufficient to overcome summary judgment. However, in each instance, the case law or the circumstances of this case derail her arguments.

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[22] *See City of Atlanta v. Williams*, 166 S.E.2d 896, 897 (Ga. Ct. App. 1969) (raised manhole condition in place for approximately one year; notice inferred under Code § 69-303); *Galbreath v. City of Logansport*, 279 N.E.2d 578, 581 (Ind. Ct. App. 1972) (photographs and testimony established defect in sidewalk in existence "for a long period of time"; referring back to jury to determine whether this constituted notice); *Peters v. State*, 252 N.W.2d 799, 804 (Mich. 1977) (flooding in roadway observed approximately three time per year over a period of six years); *James v. Metropolitan Gov't of Nashville & Davidson County*, 404 S.W.2d 249, 252 (Tenn. Ct. App. 1966) (evidence defective condition of meter box existed "for considerable length of time" is a jury question).

A. There is Nothing for a Trier of Fact to Consider In View of the Lack of Evidence Provided by Plaintiff to Support a Critical Element of Her Case.

Plaintiff argues that the issue of notice should not have been decided by the court but instead should have been left to a jury. *See* Br. at 17-18. First, plaintiff asserts that issues of "negligence" and "causation" are typically left to juries. Br. at 10 (citing *Lillegraven v. Tengs*[23] and *Sharp v. Fairbanks North Star Borough*[24]). But the cited cases do not support her point. Neither of the cases involved the question at issue here – whether the Municipality caused the dangerous condition or had notice but failed to act. The *Lillegraven* case was a personal injury case arising from a car accident in Canada.[25] And the key question before the court was which jurisdiction's statute of limitations applied.[26] In fact, there was no analysis of whether negligence was a jury issue in that circumstance. *Sharp* too was a personal injury case, involving a claim of negligent supervision.[27] The issue there was causation but it did not involve the same type of causation at issue here. The question was whether there were genuine issues of fact precluding summary judgment as to foreseeability affecting "proximate cause."[28] Further, the court explained that even though proximate cause is normally an issue for a

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[23] 375 P.2d 139 (Alaska 1962).
[24] 569 P.2d 178 (Alaska 1977).
[25] 375 P.2d at 140.
[26] *Id.* at 141.
[27] 569 P.2d at 180-181.
[28] *Id.* at 181.

trier of fact, it becomes a question of law where the evidence is such that reasonable minds cannot differ.[29]

Plaintiff also points to *Edenshaw v. Safeway, Inc.*[30] for the proposition that issues of notice should be left to the trier of fact. Br. at 18. But her reliance on that case is at odds with the decision itself (and her own admission that *Johnson* applies here). In *Edenshaw*, the court expressly declined to extend the notice requirement in *Johnson* to a private grocery store.[31] Since the court did not take up the issue, it is baffling why she believes that case dictates the outcome she desires.

Finally, apparently in an attempt to get this case to a jury, plaintiff argues that the court is not permitted to weigh credibility of witnesses. Br. at 9 (citing *Meyer*[32]). The Municipality agrees that *Meyer* says the court does not "weigh the evidence of witness credibility."[33] But there is no indication here that the court ever did that. Plaintiff certainly does not point to anything in the record that indicates as much. Accordingly, this too is insufficient basis for reversing the trial court's decision.

B. Plaintiff Must Provide More than "Minimal Evidence" in Order to Avoid Summary Judgment.

As she did in the superior court, plaintiff continues to ignore the summary judgment standard, arguing instead that only "minimal" evidence is required to overcome

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[29] *Id.* at 183-184.
[30] 186 P.3d 568 (Alaska 2008).
[31] *Id.* at 570.
[32] 994 P.2d 365.
[33] *Id.* at 367.

summary judgment. Br. at 8-9. In support of her argument she cites to *Meyer*,[34] *Alakayak v. British Columbia Packers, Ltd.*,[35] and *John's Heating Serv. v. Lamb*.[36] But these cases do not say that only "minimal evidence" is needed. Rather, they confirm that she must set forth "specific facts" that show there are genuine issues of fact.[37] They also confirm that a non-movant is required to provide more than a mere "scintilla" of evidence and, further, that such evidence must be enough to "reasonably tend [] to dispute or contradict" the movant's.[38] Viewing plaintiff's evidence in the light most favorable to her, she fails to meet this minimal standard.

Under *Johnson*, plaintiff must establish that the Municipality either caused the dangerous condition or had notice of the condition.[39] In moving for summary judgment, the Municipality argued that plaintiff lacked any evidence of these critical points. [Exc. 12-13] Thus, plaintiff must present something at this stage to show there is a genuine issue of material fact about whether or not the Municipality caused the condition or had

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[34] *Id.* at 365-67.
[35] 48 P.3d 432 (Alaska 2002).
[36] 46 P.3d 1024 (Alaska 2002).
[37] *Meyer*, 994 P.2d at 368; *Alakayak*, 48 P.3d at 448. It is true that in that case the court concluded there were issues of material fact. However, that was driven by the legal standard specific to antitrust cases. *Id.* at 448-449. *Lamb*, for its part, is also not helpful to plaintiff. In that case, most of the issues actually went to trial. 46 P.3d at 1028. Admittedly the court stated that the threshold is "low." *Id.* at 1032. However, even there specific evidence justified denying summary judgment. *Id.* (relying on statements and testimony of plaintiffs and their witnesses).
[38] *Alakayak*, 48 P.3d at 449.
[39] 636 P.2d at 52.

notice of it, but failed to act.[40] But as discussed in part I of the Argument, above, plaintiff has been unable to do that.

C. Plaintiff Improperly Attempts to Shift the Burden to the Municipality to Disprove A Critical Element of Her Case.

In an effort to avoid the fact that she lacks any evidence that the Municipality caused the defect or that it had notice of such condition but failed to act, plaintiff instead attempts to manipulate the burden of proof. She argues that the Municipality has the burden of showing the opponent's case has no merit and to negate each of the claims. Br. at 9-10 (citing *Barry v. Univ. of Alaska*[41] and *Odsather*[42]).

Barry does explain that the moving party must establish that his opponent's case has "no merit."[43] But case law also makes clear that "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[44] Accordingly, the Municipality met its burden by pointing out in its original motion that she has no evidence to prove an essential element of her case. [Exc. 12-13] At that point, the burden shifted to her to establish that she did, in fact, have some evidence.[45] As discussed above, she was unable to do that. Therefore, summary judgment was appropriate.

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[40] *See Himschoot v. Dushi*, 953 P.2d 507, 509-10 (Alaska 1998) (required to submit material, admissible evidence to establish a prima facie case).
[41] 85 P.3d 1022 (Alaska 2004).
[42] 96 P.3d 521.
[43] 85 P.3d at 1025-26.
[44] *Greywolf v. Carroll*, 151 P.3d 1234, 1241 (Alaska 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).
[45] *Greywolf*, 151 P.3d at 1241; *Cikan*, 125 P.3d at 339.

But even if the Municipality is required to submit its own evidence tending to show it did not have notice or did not cause the condition, it did so. Attached to the Municipality's Motion and Sur-Reply are affidavits of numerous municipal employees confirming their departments neither received notice of the missing lid nor performed work in that crosswalk any time near Ms. Kelly's accident. [Exc. 27-28] (Jamey Gilmore of AWWU); [Exc. 202-203] (Jack Frost of Development Services); [Exc.204-205] (David Gardner of Project Management & Engineering); [Exc. 206-207] (Gary Faraday of ML&P); [Exc. 208-209] (Daniel Southard of Street Maintenance Division); [Exc. 210-211] (Ralph Blanchard of Paint & Sign Shop).[46]

CONCLUSION

As plaintiff's briefing and affidavits make clear, her entire case is premised on the fact that a hazard existed. But the mere existence of a hazard is an insufficient basis for liability against the Municipality.[47] In the absence of any specific facts that the Municipality had notice of the hazard or that the Municipality caused the hazard, the trial court's grant of summary judgment was proper and the court should uphold that decision.

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[46] The Municipality has not emphasized these affidavits because the Municipality's view is that even if these were all disregarded, it was entitled to summary judgment. [Exc. 225, 228]

[47] *Johnson*, 636 P.2d 47.