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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. )

Supreme Court No. \_\_\_\_\_  
S-13858 DEPUTY CLERK

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 REPLY BRIEF

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## INTRODUCTION

The MOA's brief in this case actually articulates and supports Ms. Kelly's arguments that there are genuine material issues in dispute in this case such that summary judgment should not be granted. As a matter of case law relied on by the MOA, Ms. Kelly should not be prohibited Kelly from proceeding forward with her case to a trial.

Essentially, Ms. Kelly presented evidence which shows that it was undisputed that she injured her leg as a result of stepping in an uncovered valve box, (Exc. 143; 150; 154-55; 170;), that this valve box was owned by the MOA and in a painted crosswalk line, (Exc.48-51; 55), that the MOA owed a duty to put caps on uncovered valve boxes so people would not be injured, that the MOA had actual or constructive notice of this uncovered valve box, or that the MOA caused the valve box cover to be prior to Ms. Kelly stepping into it.

In its brief the MOA repeatedly asserts that Ms. Kelly failed to establish the elements of her case contrary to the evidence submitted in the form of affidavits and deposition excerpts. Also, the MOA accuses Ms. Kelly of distorting the facts, when the record in this case itself establishes a basis for the facts which Ms. Kelly relies on in her oppositions before the trial court. It is Ms. Kelly's position as clarified by this reply brief that the MOA failed as the moving party to

establish that as a matter of law that summary judgment should be granted in their favor. Ms. Kelly maintains that the trial court erred in granting summary judgment to the MOA such that the trial court's ruling should be reversed and remanded.

#### **ARGUMENT**

**I. Ms. Kelly provided evidence that the MOA had actual or at least constructive notice of the missing valve box cover prior to her fall**

Contrary to the MOA argument in its brief, Ms. Kelly provided specific evidence that the MOA caused the dangerous condition which led to Ms. Kelly's accident and injuries. Appellee's Br. at 11. Instead of relying upon alleged mischaracterizations of witness testimony, as MOA has argued, Ms. Kelly has presented actual evidence provided by witnesses to present her case of negligence to a jury. Taken together, the statements of James Griffin, Charisse Lyons, Terri Wakefield, and the maintenance records provided by the MOA show that even if the MOA did not cause the lid to be missing, at a minimum the MOA knew or should have known that the valve box cover was missing.

Charisse Lyons, the human resources manager at the Hilton at the time of Ms. Kelly's accident, was working the day Ms. Kelly fell into the hole at 3<sup>rd</sup> and F Street. (Exc. 154, 155). When she learned that Ms. Kelly had been hurt as a result of

left the valve box uncovered when they left the area. (Exc. 272-274). According to the MOA work orders they are normally recorded, once the MOA decides to go out to perform the work to cover the valve box; however, phone calls notifying them of these uncovered holes are not recorded. (Exc. 167-68). Thus, the fact that there are no records of the call to the MOA from the Hilton security does not insure that no call was made or recorded, only that the call was not recorded by the public works department. In fact, the records show that no work was directed by the public works department to be done at the intersection until after Ms. Kelly fell and was injured at 1458 on May 22, 2006. (Exc. 250-253). Even after Ms. Kelly's fall, the cover was not replaced until 0258 the following day. (Exc. 253). Consequently, a phone call from the Hilton after Ms. Lyons' fall would be sufficient to put the MOA on notice that the uncovered valve box was a hazard and needed a cover in order to prevent other pedestrians from falling.

Terri Wakefield worked with Ms. Kelly at the Hilton and was walking with Ms. Kelly at the time Ms. Kelly fell into the hole. (Exc. 175). Ms. Wakefield reported the fall to Hilton security so that security could report it to the MOA. (Exc. 175). Thus, there were two incidents within a week of each other involving pedestrians tripping in this road hazard.

stepping into the valve box, Ms. Lyons recalled her own recent encounter with this same hazard in the crosswalk in which she was almost injured. (Exc. 154; 155). Ms. Lyons' had stepped in the same hole about a week prior to Ms. Kelly's accident. (Exc. 155; 156). After Ms. Lyons had stepped in the hole, she notified the Hilton security that she tripped in the hole and asked them to cover the hole to alert others of the danger. (Exc. 155). Ms. Lyons testified that at that time the security department was responsible for reporting the accident to the MOA. (Exc. 156). In response to her request to report the hazardous uncovered valve box, security assured her that they were taking care of it. (Exc. 158-59). Ms. Lyons remembers, though, that the hole did remain uncovered for a period of time, even after she had reported it to security. (Exc. 156-57). This occurred in spite of the fact that the missing lids can be replaced by the MOA within 15-20 minutes. (Exc. 167).

Hilton Security guard, James Griffin, stated in his deposition that Ms. Lyons' incident was reported to the MOA by him or his assistant according to the protocol he used. (Exc. 270-272; 274-275). Although the Hilton security department and Ms. Lyons recall that report would have occurred, the MOA did not act to fix the cover until after Ms. Kelly was injured. (Exc. 144-45). Mr. Griffin also observed what he thought were MOA workers in the area of Ms. Kelly's fall after Ms. Lyons, who

Hilton security informed Ms. Lyons prior to Ms. Kelly's fall that they were taking care of it. (Exc. 158-59). Security officer, James Griffin, specifically recalls Ms. Lyons' report and that it occurred before Ms. Kelly was injured. (Exc. 143-144; 273-274). Ms. Lyons remembers that the hole did remain uncovered for a period of time, even after she had reported it to security. (Exc. 156-57). Mr. Griffin also remembered the valve box was left uncovered after Ms. Lyons' fall and before Ms. Kelly's fall. (Exc. 263-264). This occurred in spite of the fact that missing valve box lids, according to the MOA's managers, could be replaced within 15-20 minutes of being reported to the public works department. (Exc. 62).

Security Officer, James Griffin, stated in his affidavit that Ms. Lyons' incident was reported to the MOA. (Exc. 143-44). At his deposition he clarified that he either called it in or that it would have been called in at his direction by his assistant. (Exc. 270-272; 274-276). Although the Hilton security department and Ms. Lyons recall how the report would have been made, the MOA did not act to fix the cover until after Ms. Kelly was injured. (Exc. 31). Even though Ms. Kelly maintains both incidents were reported to the MOA, there was no one sent to replace the cover until after Ms. Kelly was seriously injured.



Finally, Ms. Lyons testified at her deposition that she remembered seeing city employees working at or near the intersection of 3<sup>rd</sup> and F, where Ms. Kelly was injured, just before Ms. Kelly's accident. (Exc. 157). Similarly, Ms. Wakefield specifically recalls that MOA employees were painting the crosswalk in the area where Ms. Kelly was injured, just before Ms. Kelly's accident and that while they were painting they had a cone covering the hole; however, when they left, they took the cone away. (Exc. 173-74). The fact that MOA employees were working at or near the crosswalk prior to Ms. Kelly's fall was also confirmed by James Griffin. (Exc. 193-194; 273-274). Additionally, in its responses to Ms. Kelly's first set of interrogatories, the MOA has stated that "the Paint Shop crew from the MOA painted the crosswalk on the north side of the intersection on May 3, 2006, but not the crosswalk where Ms. Kelly fell." (Exc. 177).

Even if the crew did not itself remove the valve box cover while painting, surely by being in that intersection they were close enough to notice that the valve cover was left open due to a missing valve box cover. In fact, Ms. Wakefield testified at her deposition that while the crew was working they had covered this valve box with a cone, but failed to place a permanent cover over the hole once they finished working. (Exc. 173). The MOA employees either removed the cover or were at least on

notice that the hole was uncovered when its workers were in the area of the crosswalks at that intersection and owed a duty to see that it was covered when they left. Also, in the MOA's pleadings there is no testimony from the MOA showing that this hole was covered when they left the area.

Both Ms. Kelly and the MOA have supplied evidence indicating MOA employees were indeed in the area and specifically in the intersection just before Ms. Kelly's accident. This alone would especially, if combined with Ms. Lyons', Ms. Wakefield's, and Mr. Griffin's testimony, would be sufficient to provide the MOA with notice that there was an open valve box that required covering which the MOA had a duty to cover. Taken together the fact that Hilton security states that it notified or that an employee would have notified the MOA of Ms. Lyons' fall and that the MOA was working in this area prior to Ms. Kelly's fall, the MOA had notice of the hazard prior to Ms. Kelly being injured. A factual dispute exists such that summary judgment should not have been granted to the MOA since there is direct or circumstantial evidence that the MOA was negligent in not replacing the valve box cover.

**II. Ms. Kelly provided evidence that the MOA caused the dangerous condition by removing the lid from the valve box and failed to cover it prior to her fall.**

No notice actual or constructive is required if the MOA caused the dangerous condition which resulted in Ms. Kelly's injuries. Johnson v. State, 636 P.2d 47, 52-53 (Alaska 1981). Ms. Kelly presented direct and/or circumstantial evidence that the MOA created this hazard. Both Ms. Lyons and Ms. Wakefield testified at their depositions that they saw work being done at the corner of F and 3<sup>rd</sup> Street by MOA employees prior to and near the time of Ms. Kelly's accident. (Exc. 157; 173-74). Ms. Wakefield recalls that the MOA had painted the crosswalk just before Kelly's accident, that she noticed that the hole was uncovered, and that a cone was placed on it to mark it. (Exc. 174-175). She also noticed that when the workers left, they took the cone away, and did not place the cover back on the valve box. (Exc. 173-74). Security Officer, James Griffin, made this same observation. (Exc. 144; 273-274). Under Johnson, supra, the MOA's placing a cone on the uncovered valve box and failing to cover the valve box in of itself would cause them to be held liable for pedestrians falling in the valve box.

Additionally, in its responses to Ms. Kelly's first set of interrogatories, the MOA confirmed that "the Paint Shop crew from the MOA painted the crosswalk on the north side of the

intersection on May 3, 2006, but not the crosswalk where Ms. Kelly fell." Taken together, this evidence directly or circumstantially shows that the MOA crew was working in the intersection, either removed the cover to the valve box then covered it with a cone and removed the cone when it finished working in the area, or that they placed a cone on an existing uncovered valve box and left it open after the cone was removed and they left this area. A jury could find the MOA liable for negligence for either removing the cover and leaving the hole exposed when they left or placing a cone on the uncovered hole and not covering the valve box when they removed the cone and left. Under these facts it was error to grant summary judgment in favor of the MOA.

**III. Summary judgment should have been denied to the MOA because the issues in this case are not appropriate for resolution by summary judgment.**

In Johnson v. State, 636 P.2d 47, 52 (Alaska 1981), this court discussed the issue of actual and constructive notice to the state or MOA of an unsafe condition stating:

Notice is relevant, and necessary, when the dangerous condition is not caused by the state. In such a case, the plaintiff must establish either actual or constructive 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.

. . .

Notice is also a permissible inference that the jury may draw where there is evidence of prior accidents caused by the asserted dangerous condition.

This court cited in support of this ruling a number of cases which all held that whether the evidence was sufficient to constitute notice to a city was a question for a jury; thus, a question inappropriate for resolution by summary judgment. See City of Atlanta v. Williams, 166 S.E.2d 896, 897 (Ga. App. 1969); Galbreath v. City of Logansport, 279 N.E.2d 578, 581 (Ind. App. 3d Dist. 1972); James v. Metro. Govt. of Nashville and Davidson County, 404 S.W.2d 249, 252 (Tenn. App. 1966). Similarly, in Ms. Kelly's case, the trial court should not have granted summary judgment to the MOA because the issues in this case involve serious factual questions. Questions exist as to whether the MOA caused this condition, placed a cone rather than a lid on the valve box, left the uncovered valve box when they left the area, or whether they had actual or constructive notice of this condition, which should be presented to a jury and not disposed of by summary judgment.

#### **CONCLUSION**

Whether the MOA uncovered the valve box and left it open or upon notice, failed to cover the valve box, are disputed facts

in this case. The undisputed fact is that the valve box was uncovered and Ms. Kelly was injured when she fell into the valve box. Both the testimony of Ms. Lyons and the Hilton security guard demonstrate that the MOA had actual notice or constructive notice that the cover was off the valve box well before Ms. Kelly's foot went into it. Also, the testimony of Ms. Lyons, Ms. Wakefield, and the MOA records indicate that a painting crew was in the area before Ms. Kelly's foot went into the hole. In contrast the MOA does not have testimony that a cover was actually in place over the valve box at any time before Ms. Kelly was injured. Likewise, the MOA public works record system fails to eliminate the fact that they were called about this condition without it being recorded. Even if the MOA did not remove the cover themselves, Ms. Kelly argues they at least they had actual or constructive notice that it was uncovered.

Consequently, Ms. Kelly has put forth sufficient evidence, which may be disputed, to establish that the MOA should have known of this hazardous condition and was negligent. Furthermore, these factual issues should have been presented to a jury for resolution. It was error for the trial court to grant summary judgment in favor of MOA. Based on the evidence submitted in the motions and oppositions to summary judgment, the trial court erred in granting summary judgment and this case should be reversed and remanded.

