

ALASKA SUPREME COURT

February 24, 2011

Oral Argument Case Summary

CASE #2

Ethel B. Kelly, Appellant, v. Municipality of Anchorage, Appellee.

Supreme Court No. S-13858

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ATTORNEYS

- *Attorneys for the Appellant, Ethel B. Kelly:*

Charles W. Coe, Law Office of Charles W. Coe, Anchorage.

- *Attorneys for Appellee, Municipality of Anchorage:*

Pamela D. Weiss, Assistant Municipal Attorney, and Dennis A. Wheeler, Municipal Attorney, Municipality of Anchorage.

QUESTIONS PRESENTED ON APPEAL

- ✓ Did the trial judge err in dismissing Ethel B. Kelly's personal injury case by granting summary judgment to the Municipality of Anchorage?
 - Were there "genuine issues of material fact" on the question of whether the Municipality of Anchorage caused the condition that led to Kelly's injury, namely, an uncovered "valve box" in the crosswalk at 3rd Avenue and F Street that Kelly stepped in, causing her to fall and sustain injuries to her leg, ankle, knee, hip and back?
 - Were there "genuine issues of material fact" on the question of whether the Municipality of Anchorage had *actual* notice about the uncovered valve box in the crosswalk before Kelly's accident?
 - Were there "genuine issues of material fact" on the question of whether the Municipality of Anchorage had *constructive* notice about the uncovered valve box before Kelly's accident?

MAJOR AUTHORITIES TO CONSIDER

Alaska Court Rules

- ***Alaska Rule of Civil Procedure 56.*** Summary Judgment

Alaska Supreme Court Case Law

- ***Alakayak v. British Columbia Packers, Ltd.***, 48 P.3d 432 (Alaska 2002)
- ***Cikan v. ARCO Alaska, Inc.***, 125 P.3d 335 (Alaska 2005)
- ***Johnson v. State***, 636 P.2d 47 (Alaska 1981)
- ***John's Heating Service v. Lamb***, 46 P.3d 1024 (Alaska 2002)
- ***Kinzel v. Discovery Drilling, Inc.***, 93 P.3d 427 (Alaska 2004)
- ***Meyer v. State, Department of Revenue***, 994 P.2d 365 (Alaska 1999)

SUMMARY OF THE CASE

Ethel Kelly fell and was seriously injured on May 22, 2006, when she stepped into an open valve box in a downtown Anchorage crosswalk next to her place of employment, the Anchorage Hilton Hotel. Another Hilton employee, Clarisse Lyons, had stepped into the same open valve box about a week before and had asked hotel security to notify the Municipality of the hazard it posed. According to the hotel's security supervisor, James Griffin, it would have been hotel protocol to report the problem to the Municipality as Lyons requested. Griffin does not remember contacting the Municipality himself, but assumes his assistant did so, based on company protocols. The Municipality has no record of being contacted.

According to hotel security and other hotel workers, the valve box remained open between the time of the Lyons' incident and Kelly's accident. Kelly's witnesses also report seeing workers that they assumed were municipal employees working in the crosswalk around the time of both events. After Kelly fell on May 22, hotel staff contacted the Municipality about the open valve box, and municipal workers responded and fixed it. Only this May 22 report is documented in municipal records.

Kelly filed a lawsuit on January 10, 2008,¹ alleging that the Municipality had failed to maintain the crosswalk in a safe and reasonable manner by not covering the valve box, not marking it to warn of the hazard, and not monitoring it adequately, among other claims. She sought damages for injuries to her knee, ankle, leg, hip and back; for medical expenses; for physical and emotional pain and suffering; for lost wages; for loss of full use of her body and full enjoyment of life; and for other losses to be proven at trial.

¹ See Kelly's *Complaint*, Excerpt of Record at pages 1-4.

The Municipality of Anchorage defended against Kelly’s complaint by claiming that its conduct was justified under the circumstances; that it acted in a manner that was “proper, reasonable, lawful and exercised in good faith;” that it had no duty to protect Kelly from conditions “of which it had no actual or constructive knowledge;” and that Kelly’s injuries, if any, were caused by others over whom it had no responsibility or control.²

On July 21, 2009,³ the Municipality moved for “summary judgment,” claiming that Kelly’s case should be dismissed as a matter of law because Kelly was unable to present any evidence that the Municipality caused the condition in the crosswalk or any evidence that the Municipality had notice of the missing cover prior to her fall. Superior Court Judge Peter A. Michalski granted summary judgment on March 30, 2010, and this appeal followed.

LEGAL ISSUES ON APPEAL

Liability. As a general principle of tort law, a government entity cannot be liable for damages for personal injury unless it *caused* the condition that led to the injury or it had *notice* of the condition—either *actual* or *constructive*—and failed to act to correct it. Constructive notice can be demonstrated “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.”⁴ Kelly claims that she can establish the Municipality’s liability for her injuries if she is allowed to go to trial. The Municipality claims that Kelly has no specific evidence to prove the requirements for liability, and a trial is unnecessary.

Summary Judgment. In most circumstances, parties to a lawsuit have the right to trial by a jury of their peers on the factual disputes in their case. The jury hears the testimony of witnesses and other evidence presented and renders a decision on what they believe occurred. However, sometimes a lawsuit can be resolved without a trial—through an outcome known as “summary judgment.” To be granted summary judgment, the party seeking it (the “movant”) must demonstrate that there are no “genuine issues of material fact” in the case, and that it can be resolved as a matter of law. Because granting summary judgment prevents the non-moving party from having their day in court on the factual issues, the trial court must “draw all reasonable inferences of fact from the proffered materials *against* the movant and *in favor of* the non-moving party.”

² See the Municipality’s *Answer to Complaint*, Excerpt of Record at pages 5-8.

³ See *Defendant Municipality of Anchorage’s Motion for Summary Judgment*, Excerpt of Record at pages 9-31.

⁴ *Johnson v. State*, 636 P.2d 47 (Alaska 1981).

Kelly's Position. In Kelly's view, she is entitled to a jury trial. Her case should not have been dismissed on summary judgment as a matter of law because "genuine issues of material fact" exist on each of the major claims in her case. First, she presented evidence that the Municipality *created* the hazard: witnesses stated that municipal workers were working in the crosswalk in the days preceding her injury and had posted cones at the site—an indication that they could have removed the valve cover and neglected to replace it. Second, she presented evidence that the Municipality had *actual* notice of the exposed valve box in the days before Kelly's accident: hotel staff reported the earlier Lyons incident to security and under hotel protocol security staff would have notified the Municipality. That this notification was not documented in municipal records does not mean no notice was given, since evidence also shows that the Municipality's method of tracking such notifications was unclear and incomplete. Third and finally, she presented evidence that the Municipality had *constructive* notice of the exposed valve box and the danger it posed: witnesses reported that the valve box remained uncovered for a number of days before Kelly's accident, and many municipal vehicles and workers pass through the intersection regularly and had the opportunity to observe and fix the problem.

Kelly's evidence must be taken in the light most favorable to her under the rules for summary judgment. She does not need to prove she will prevail at trial, only that "genuine issues of material fact" remain in dispute.⁵ Based on the evidence she has presented, and further evidence she may present at trial, a jury could find that the Municipality caused the valve box to be uncovered or had actual or constructive notice of the problem. Such factual questions are for the jury to weigh and decide, and the trial court erred by substituting its judgment of the facts for the jury's role. The jury, not the judge, should weigh the credibility of parties and witnesses. The jury, not the judge, should consider the totality of the evidence and decide what likely happened. By granting summary judgment and dismissing her case, the judge has deprived her of her day in court before a jury of her peers.

Municipality's Position. In the Municipality's view, Kelly is not entitled to a jury trial because there are no "genuine issues of material fact." None of her witnesses can say they saw municipal workers remove the valve box cover and fail to replace it; none of them can confirm that a call was actually made to the Municipality notifying them of the open valve box before Kelly's fall; and none of them can verify that the open valve box was so obvious that passing municipal workers should have known about it. Even if taken in the light most favorable to Kelly, her evidence amounts to "mere allegations," which are not enough to defeat summary judgment.⁶ Instead, "specific facts" are required, and "more than a scintilla of contrary evidence"⁷ must be presented.

⁵ *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 438-439 (Alaska 2004).

⁶ *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

⁷ *Id.*

According to the Municipality, a close examination of the affidavits and depositions of Kelly’s witnesses shows that they have only vague recollections of the circumstances surrounding her accident and cannot confirm based on personal knowledge several key facts she must prove to win her case. For example, her witnesses could not confirm that the workers they saw in the crosswalk were municipal workers, and most could not confirm when the workers were seen or what they were doing. Also, her witnesses could not confirm based on personal knowledge that any notice of the open valve box was ever given to the Municipality; they assumed it had been given based on general protocols, but none could remember actually giving it. And finally, Kelly’s witnesses could only verify that the valve box cover was missing for about a week before her accident, and “a week is insufficient to support a claim of constructive notice.”⁸ Even if one week were sufficient, Kelly’s witnesses could not show that the valve box hole was “obvious;” in fact, her witnesses confirmed the contrary: that the hole was quite difficult to see. In contrast, the Municipality presented affidavits of numerous municipal employees confirming that their departments not only received no notice of any hazardous condition in the crosswalk in the days before Kelly’s injury, but also performed no work in or near the crosswalk during the period in question.

In the Municipality’s view, Kelly bases her case “on the fact that a hazard existed.” But the fact that a hazard exists does not mean that the Municipality can be held liable. In the absence of specific evidence that the Municipality caused the hazard or had notice of the hazard and failed to fix it, summary judgment against Kelly was proper and the decision of the trial court should be upheld.

QUESTIONS FOR STUDENTS TO CONSIDER

1. What essential facts must Kelly prove for the Municipality to be liable for her injuries?
2. Describe briefly Ethel Kelly’s version of the facts in this case. Examine the excerpts of witness statements on the following pages of the record and evaluate whether these support or undermine her position that there are “genuine issues of material fact”:

➤ Affidavit of Terri Wakefield	Excerpt of Record at 48-50
➤ Deposition of Terri Wakefield	Exc. 169-175
➤ Affidavit of James Griffin	Exc. 143-146
➤ Deposition of James Griffin	Exc. 234-280
➤ Affidavit of Charisse Lyons	Exc. 147-148
➤ Deposition of Charisse Lyons	Exc. 117-124

⁸ *Appellee’s Brief* at page 11. According to the Municipality, constructive notice is generally only found when hazards have existed for months or years.

3. Describe briefly the Municipality's version of the facts in this case. Examine the excerpts of its witness statements on the following pages of the record and evaluate whether these support or undermine its position that there are no "genuine issues of material fact":

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| ➤ Affidavit of Jamey W. Gilmore | Exc. 27-28 |
| ➤ Deposition of Jamey Gilmore | Exc. 52-66 |
| ➤ Deposition of Robert W. Bennett | Exc. 67-77 |
| ➤ Affidavits of Department Representatives | Exc. 202-211 |
| ➤ "Paint Sheet" | Exc. 133 |
| ➤ "Service Order Details" | Exc. 31 |

4. In your view, what evidence in the record is most helpful to Kelly's position? What evidence is most helpful to the Municipality's?

5. Do you agree or disagree with the trial court's decision to grant summary judgment? Do you agree or disagree that there are no "genuine issues of material fact" that should go to the jury in this case? Why or why not?

6. Why do you think court rules allow the granting of summary judgment? What are the advantages of resolving cases before trial? What are the disadvantages?