IN THE SUPREME COURT FOR THE STATE OF ALASKA

ETHEL B. KELLY,	)	
	)	Supreme Court No.
Appellant,	)	**S-13858**
	)	
v.	)	
	)	
MUNICIPALITY OF ANCHORAGE,	)	
	)	
Appellee.	)	
	)	

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 BRIEF

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STATUTES AND RULES

Rule 204. Appeal: Time--Notice--Bonds.

(a) **When Taken - Appeals and Cross-Appeals.**

(1) *Appeals.* The notice of appeal shall be filed within 30 days from the date shown in the clerk's certificate of distribution on the judgment appealed from, unless a shorter time for filing a notice of appeal applies as provided by Rules 216-220, or unless a different time applies as provided in AS 23.30.128(g).

JURISDICTIONAL STATEMENT

This is an appeal of a final judgment issued by the superior court, Judge Peter A. Michalski, on April 27, 2010, dismissing Ethel Kelly's complaint for damages against the Municipality of Anchorage in its entirety.

Jurisdiction to hear this appeal of that final judgment is pursuant to Alaska Appellate Rule of Procedure 202(a). It was timely filed May 7, 2010, within 30 days pursuant to Alaska Appellate Rule of Procedure 204(a)(1).

PARTIES TO THE ACTION

The trial court had two parties to the action, Ethel Kelly, plaintiff, represented by Charles W. Coe and Municipality of Anchorage, defendant, represented by Pamela D. Weiss, Assistant Municipal Attorney.

STATEMENT OF ISSUES ON APPEAL

1. Disputed material facts were at issue in this case and the trial court erred in granting summary judgment in favor of the MOA.

2. The trial court erred in granting summary judgment and not accepting that Ms. Kelly provided evidence to the trial court that the MOA had notice of the missing valve box cover and failed to replace it.

3. The trial court erred in granting summary judgment when there was evidence that the MOA removed the lid from the valve box and failed to replace it prior to Ms. Kelly's fall.

4. The trial court erred if it accepted the MOA's interpretation of the standard of care in Johnson v. State.

5. The trial court erred in failing to grant Ethel Kelly's cross-motion for summary judgment.

STATEMENT OF THE CASE

This is a personal injury case in which the appellant, Ethel Kelly, stepped into an open uncovered valve box hole while she was going from the parking lot to her place of employment at the Anchorage Hilton Hotel. (Exc. 2). Even though Ms. Kelly provided proof that she fell and was injured along with proof that the Municipality of Anchorage (MOA) caused this condition and should have known about it, (Exc. 48-51, 143, 48-76). the trial court granted summary judgment dismissing her case. (Exc. 215). The exact reasons for this dismissal are unclear; however, there are clear facts in dispute which would prevent summary judgment, dismissing this matter, from being granted.

In this case Ms. Kelly argues that she should be allowed to go to trial. She intends to use the testimony of Terri Wakefield who was with her when she fell and saw the uncovered hole days before the fall. (Exc. 48-51, 169-175); Clarisse Lyons, who fell in the same hole prior to Ms. Kelly and had it

reported to the MOA,(Exc. 153-161), and James Griffin, the Hilton security officer, who saw the open hole before Ms. Kelly's fall and whose department would have reported it to the MOA prior to Ms. Kelly's fall. (Exc. 143-145, 153-165). Based on these facts, which the MOA disputes, there is enough evidence to deny summary judgment dismissing Ms. Kelly's case and allow a jury to determine if the MOA was negligent. The order and judgment dismissing Ethel Kelly's case should be set aside and this matter should be reversed and remanded. (Exc. 215, 217).

FACTS

On May 22, 2006, Ethel Kelly, was crossing 3rd Avenue at her place of employment, the Anchorage Hilton, with a co-worker, Terri Wakefield. (Exc. 48). As they walked Ms. Kelly's foot fell into an unmarked uncovered pipe hole, also referred to as a valve box. (Exc. 49).

Prior to Ms. Kelly being injured, this area was being maintained or worked on by the MOA. (Exc. 49-50). 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 injured. (Exc. 49). Another Hilton employee, Charisse Lyons, stepped into the hole prior to Ms. Kelly and according to security officer, James Griffin, the MOA was informed, or would have been informed, of this hazard by Hilton security. (Exc. 34-35; 143-44).

According to Ms. Lyons, who fell into this uncovered hole prior to Ms. Kelly, this condition was reported to Hilton Security who would then report it to the MOA. (Exc. 153-161). The Hilton security either through James Griffin directly or under his direction, reported this uncovered valve box to the MOA after Ms. Lyons' fall and prior to Ms. Kelly's fall. (Exc. 143-145, 190-201, Tr. Oral Argument, March 23, 2010). In their motion and in response to the MOA denies that they have records of being contacted about the missing cover prior to Ms. Kelly's fall and deny they were working at the crosswalk prior to Ms. Kelly's fall. (Exc. 206-211).

Employees of Department of Public Works, for the MOA, at deposition admitted that the MOA was responsible for keeping lids on the valve boxes. (Exc. 70). This was done to both protect the valve box and for the safety of the public. (Exc. 53). Additionally, they testified that if a lid was taken off or missing, it would be below their standards of care to leave it off. (Exc. 54, 69). They testified that the MOA has no program to inspect for missing covers. (Exc. 53). Also, if they receive a report of a missing lid, they can replace it within 15-20 minutes. (Exc. 62).

PROCEDURAL HISTORY

On January 11, 2008, Ethel Kelly filed suit against the MOA alleging that it was negligent in leaving an opened hole in the crosswalk at the intersection of 3rd Avenue and F Street in downtown Anchorage, which should have been covered with a valve box cover. (Exc. 1-4). After answering and denying these allegations, the MOA filed a motion for summary judgment on July 21, 2009, seeking to dismiss all causes of action in Ms. Kelly's complaint. (Exc. 5-8; 9-32). Ms. Kelly opposed this motion and filed a cross-motion for summary judgment on August 24, 2009, seeking summary judgment on several undisputed facts, as well as a ruling that the MOA was negligent as a matter of law. (Exc. 33-77). The MOA filed its reply and opposition to the cross-motion on November 5, 2009. (Exc. 87-133). Ms. Kelly replied on November 24, 2009. (Exc. 134-78). The MOA filed a sur-reply on March 18, 2010. (Exc. 183-212). Oral arguments on this motion were held on March 23, 2010. (Tr. Hrg. Mar. 23, 2010).

On March 30, 2010, the trial court granted summary judgment dismissing all of the Ms. Kelly's causes of action and entered final judgment on April 27, 2010, awarding the MOA attorney's fees and interest. (Exc. 215, 217-18). On May 7, 2010, Ms. Kelly filed a notice of appeal with this court appealing the final judgment in favor of the MOA which dismissed Ms. Kelly's case. (Exc. 219).

STANDARD OF REVIEW

This court reviews grants of summary judgment de novo and in the light most favorable to the non-moving party. Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 438-439 (Alaska 2004). Summary judgment is upheld if the evidence presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. The party opposing summary judgment need not establish that it will ultimately prevail at trial, but only that there exists a genuine issue of fact to be litigated. Id.

ARGUMENT

1. Disputed material facts were at issue in this case and the trial court erred in granting summary judgment in favor of the MOA

Evidence was presented to the trial court showing that the MOA had notice of the open valve box, and the MOA produced evidence to show that it did not have a record of receiving notice of this condition. The MOA only presented evidence that it had no record that it had received notice though its division of public works, but did not show that it did not receive notice through other departments about this condition.

The MOA argued that Jamey Gilmore and Robert Bennett of the public works department, had no work order for replacing the valve lid so the MOA was never put on notice and had no responsibility for Ms. Kelly's injury. (Exc. 13, 93). However,

each of these public works managers testified that their systems only show work orders from their individual departments, and not calls into their departments from members of the public notifying them of conditions requiring attention such as valve box lids that need replaced. (Exc. 62-64). Furthermore, a call into their departments does not always result in a work order to fix the situation being generated. (Exc. 64). In particular, notice of a missing valve box lid is not always recorded. Id. Additionally, not all calls to report missing valve box lids are directed to the proper department. (Exc. 54, 57-58). Some of the calls are made to street maintenance, the police department, city engineering etc., and these calls are not necessarily routed to the correct department. (Exc. 54, 57-58). In fact one of the calls made in this case actually went directly to the street maintenance department. (Exc. 71-72).

In this case Ms. Kelly argued and provided evidence that the valve box cover over the hole she fell in was left off by maintenance crews working on the crosswalk that she and other Hilton employees use on a daily basis. (Exc. 40-42, 48-50, 84-85). Other co-workers Terri Wakefield and Charisse Lyons stated in their affidavits that the missing valve box cover condition existed before Ms. Kelly's injury and that the MOA was notified or should have known about it due to the length of time it was left off. (Exc. 48-50, 84-85). In response the MOA provided

evidence which shows that their crews were painting in that area prior to Ms. Kelly's injuries. (Exc. 177). Finally, it would be almost impossible to imagine that this uncovered valve box could go unnoticed on 3rd Avenue and F Street considering the substantial number of police vehicles, street maintenance, buses and MOA vehicles that travel over that area every hour of the day.

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. This court has set up very restrictive standards on how such motion should be considered by the trial court. In fact, in the past this court has consistently set aside a trial courts grant of summary judgment to non-moving parties, especially in negligence cases such as Ms. Kelly's case.

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), this 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 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 then 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).

It has long been a standard that issues of negligence are left to the jury and not dismissed by summary judgment. Lillegraven v. Tengs, 375 P.2d 139 (Alaska 1962). The same is true with issues of causation. Sharp v. Fairbanks North Star Borough, 569 P.2d 178 (Alaska 1977). In this case Ms. Kelly's witnesses state that the valve box cover was off prior to her fall and that the MOA was or would have been contacted about it. Alternatively, her witnesses state that they saw workers either painting the crosswalk or working on it resulting in the cover being left off. Based on this testimony and the standards of care the MOA had for replacing these covers, the MOA's summary judgment at a minimum should have been denied by the trial court.

2. The trial court erred in granting summary judgment and not accepting that Ms. Kelly provided evidence to the trial court that the MOA had notice of the missing valve box cover and failed to replace it

Taken together, the statements of Charisse Lyons and Terri Wakefield, and the records of maintenance provided by the MOA show that at a minimum the MOA knew, or should have known, that the cover to the valve box was missing. In response, the public works department and the painting department only admit that it

has no record of the reports of a missing cover; however, the departments cannot state that it was not called about the missing valve box nor is there any evidence that the MOA streets and maintenance department did not know about the cover being off.

Charisse Lyons was a human resources manager at the Hilton at the time of Kelly's accident. (Exc. 154). Ms. Lyons was working the day Ms. Kelly fell into the hole at 3rd and F Streets and when she . Ms. Lyons recalled her recent encounter with the same hazard in the crosswalk days before Ms. Kelly fell. (Exc. 155). Ms. Lyons had stepped in the same hole about a week prior to Kelly's accident. (Exc. 155-56). After Ms. Lyons herself had tripped in that hole, she had informed security that she tripped in the hole and asked them to put something over the hole to alert others of the danger. (Exc. 155). Ms. Lyons testified that it was also the responsibility of the security department to report the accident to the MOA. (Exc. 156).

In response to Ms. Lyons request to report the hazardous uncovered hole, Hilton security informed her that they were taking care of it. (Exc. 158-59). Security officer, James Griffin, specifically recalls Ms. Lyons' request and that it was reported by his department before Ms. Kelly was injured. (Exc. 143-44). 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). This occurred is in spite of the fact that missing lids, according to the MOA's managers, could be replaced within 15-20 minutes 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 stated that he either called it in or that it would have been called in at his direction. (Tr. Oral Argument, dated March 23, 2010). 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).

The MOA managers testified that work orders are recorded, once the MOA decides to go out and perform the work to cover the hole, but that phone calls making reports of uncovered valve boxes are not recorded. (Exc. 62-63). So the fact that there are no records of the call to the MOA from Hilton security does not mean that there was no call made by Hilton security, only that it was not recorded by the public works department to obtain a work order. In fact no work to replace the lid was directed to be done at the intersection until after Ms. Kelly fell at 1456 on May 22, 2006, and was injured. Even then after it was immediately reported, the work was not actually done until 0258 the following day. (Exc. 143-44). Thus, the phone

call in and of itself from the Hilton after Ms. Lyons' fall was sufficient to put the MOA on notice that the hole was a hazard and needed to be repaired in order to prevent Ms. Kelly's accident several days later.

Terri Wakefield worked with Ms. Kelly at the Hilton and she was walking with Ms. Kelly when Ms.Kelly was injured from falling into the hole. (Exc. 170). Ms. Wakefield reported the incident to security so that security could report it to the MOA. (Exc. 175). Thus, there were two incidents within days of each other. First Ms. Lyons tripped in the hole and was uninjured, then about a week later Ms. Kelly tripped in the hole and suffered serious injuries. Both incidents according to Hilton security were reported to the MOA. However, the MOA did not send anyone to cover the hole until after Ms. Kelly was seriously injured.

Ms. Lyons testified at her deposition that she remembered seeing MOA employees working at or near the intersection of 3rd 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. While they were painting Ms. Wakefield noticed the MOA had a cone covering the hole, but when they left, they took the cone away. (Exc. 173-74). Additionally, James Griffin

monitored this hole after Ms. Lyons' fall and said workers were leaving the cover off prior to Ms. Kelly's injury. (Exc.144).

Finally, in its responses to Ms. Kelly's first set of interrogatories, the MOA stated that "the Paint Shop crew from the Municipality 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 their crew did not itself remove the valve box cover, surely by being in that intersection they were close enough to notice the hole was left open and that the valve box cover was missing. In fact, Ms. Wakefield and Mr. Griffin testified that while the crew was working they had covered the hole with a cone, but failed to place a permanent cover over the hole once they finished working. (Exc. 143-145, 173-74). Once again, there is evidence for a jury to find that the MOA was at least on notice that the hole was uncovered when its workers were in the area.

Both Ms. Kelly and the MOA have supplied evidence indicating that MOA employees were indeed in the area and specifically in the intersection just before Ms. Kelly's accident. This alone is sufficient to provide the MOA with notice that there was an open valve box that required covering and that the MOA had a duty to cover their valve box. Taken together the fact that Hilton security notified the MOA of Ms. Lyons' fall and the MOA was working in the area prior to Ms.

Kelly's fall, the MOA had notice of the hazard prior to Ms. Kelly being injured and failed to cover the valve box or inspect it to insure it was covered. The MOA also failed to submit evidence from the streets and maintenance department that it did not know about the uncovered hole or that it did not cover it before Ms. Kelly's fall. Summary judgment should have been granted in Ms. Kelly's favor because the MOA would be negligent. Alternatively, summary judgment in favor of the MOA should have been denied because Ms. Kelly presented sufficient evidence to the trial court to raise a genuine disputes of fact.

3. The trial court erred in granting summary judgment when there was evidence that the MOA removed the lid from the valve box and failed to replace it prior to Ms. Kelly's fall

Both Ms. Lyons and Ms. Wakefield testified at their depositions that they saw work being done at the corner of F Street and 3rd Avenue by MOA employees near the day of Ms. Kelly's accident. (Exc. 157, 173-74). Ms. Wakefield also recalls that the MOA had painted the crosswalk just before Ms. Kelly's and put a cone on the uncovered valve box to mark it. However, when the workers left, they took the cone away, and did not the valve box. Id.

In addition, in its responses to plaintiff'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." (Exc. 177). It's clear from the photographic evidence and the testimony of Mr. Gilmore that the hole was in the crosswalk and had been painted over at some point. (Tr. Hrg. 7:5-22; Exc. 47, 51). Taken together, this evidence shows that the crew working in the intersection, removed the cover to the valve box, then covered it with a cone and removed the cone when it finished working in the area, but failed to put the cover on the valve box. This argument was also raised before the trial court at oral argument. (Tr. Hrg. 13:21-18:1). In this case the MOA is liable for negligence for leaving the uncovered valve box exposed, which caused Ms. Kelly's injuries. Summary judgment should have been granted in Ms. Kelly's favor or denied as to all parties of this issue.

4. The trial court erred if it accepted the MOA's interpretation of the standard of care in Johnson v. State

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 MOA, in its motion for summary judgment cited to the affidavit of Jamey Gilmore and the deposition of Wayne

Bennett, two public works' employees. Both stated that they have no record of their departments having done any work at or near the intersection at the time of the incident in its motion as their proof that the MOA had neither actual or constructive notice of the missing valve box cover. (Exc. 13, 27-28, 29). However, Ms. Kelly maintains that there is evidence that the MOA had actual notice of the dangerous condition in this case since it created the condition according to Terri Wakefield and since there is testimony that they were either put on notice or created this condition prior to Ms. Kelly's fall. (Exc. 49-50, 173-74).

Even if the affidavits and depositions of Ms. Wakefield and Ms. Lyons do not support that the MOA 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, 636 P.2d at 52-53.

Ms. Lyons' and Ms. Wakefield's testimony could lead reasonable jurors to conclude that the MOA and its public works department were made aware of the missing valve cover prior to the Ms. Kelly's fall, or to find that the missing lid cover had been missing for a sufficient amount of time such as the MOA had constructive notice of this dangerous condition. Both Jamey

Gilmore and Robert Wayne Bennett, department supervisors with the MOA, testified that the customs and practices of their department for discovering/repairing valve box lids or being notified of them by other department was erratic at best, and insufficient to provide proper notice to the city when the valve box lids are missing. (Exc. 54, 57-58, 62-64). 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., 186 P.3d 568 (Alaska 2008), the issue of notice is one that must be left to the trier of fact; thus, defendant's motion for summary judgment should have been denied.

5. The trial court erred in failing to grant Ethel Kelly's cross-motion for summary judgment

Ms. Kelly raised several undisputed issues for which summary judgment should have been granted in her favor. (Tr. Hrg. 6:14-22). First, it is undisputed that she stepped into an uncovered valve box and was injured. (Exc. 87; Tr. Hrg. 2:9-14). Second, it is undisputed that the MOA owned and maintained the valve box and its cover. (Exc. 87). Third, it is undisputed that if the MOA left this lid off or was notified about it, the MOA would be responsible for putting a cover back on the valve box. Id. Fourth, it is undisputed that the cover for this valve box was off prior to Ms. Kelly actually stepping in the hole. (Tr. Hrg. 2:10-16). Finally, Ms. Kelly submitted

proof that the MOA either left the cover off during maintenance of that area or that it was on notice that it was off prior to Ms. Kelly being injured. (Exc. 143-44, 155, 157, 173-74, 177). The testimony of Mr. Gilmore and Mr. Bennett demonstrates that the MOA had no work orders for repairing this box prior to Ms. Kelly being injured. However, Mr. Gilmore and Mr. Bennett do not state that there were no calls received 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, at a minimum, have been granted since they are uncontested. The only issues left are the issues of actual negligence for which summary judgment for either party cannot be granted.

CONCLUSION

The MOA's motion for summary judgment should have been denied because they did not prove that they were not notified of this dangerous condition prior to Ms. Kelly's. Additionally, there is evidence that this hazard was created by the MOA and the MOA had either actual or constructive notice that this cover was off.

Ms. Kelly maintains that there are undisputed issues of facts in her favor in this case. Consequently, summary judgment should have been granted to her on the issues raised in her motion. Ms. Kelly also maintains that she should have been

granted summary judgment on the issue of negligence or that summary judgment regarding the issue of negligence should have been denied as to each party. Based on the case law in the state of Alaska and the disputed genuine issues of fact, the trial court erred in its ruling dismissing Ms. Kelly's case and this ruling should be reversed and remanded.