Court of Appeals of Washington, Division 1.

Howard CONINE and Karen Conine, husband and wife and their marital community, Appellants,

v.

COUNTY OF SNOHOMISH, a political subdivision of the State of Washington; State of Washington; and Washington State Department of Transportation, Respondents.

No. 57961-4-I.

Not Reported in P.3d, 2007 WL 1398846 (Wash.App. Div. 1)

May 14, 2007.

UNPUBLISHED OPINION

APPELWICK, C.J.

***1** Howard and Karen Conine were driving on State Route 524 through Snohomish County when a roadside tree fell onto their car. They sustained personal injuries and property damage. They filed a suit against Snohomish County as the landowner of the property where the tree grew and against the State for negligent maintenance of the roadway. The trial court granted summary judgment for the State and County, finding that neither had a duty to look for the hazardous tree. The court also cited the public duty doctrine as a second basis for the ruling. We reverse the summary judgment and remand for further proceedings.

FACTS

At approximately 7:30 p.m. on January 22, 2003, Howard and Karen Conine were driving southbound on State Route 524 through Snohomish County when a tree fell on their vehicle. The red alder originally stood on an embankment on the west side of the road. The tree landed on the front of the car, crushing the vehicle and injuring the Conines. The tree had been located about 10 feet outside the State's right of way on land owned by Snohomish County.

The Conines filed lawsuits against the State of Washington for failure to maintain the state highways in a reasonably safe condition and against the County for failure to remove an obvious hazard from its property. The Conines employed a certified arborist to provide expert evidence about the condition of the tree. According to the arborist's report and declaration:

During the 6-12 months immediately preceding the trees [sic] failure, it would have looked like a forked snag with no fine or scaffold branches, sloughing bark and fungi growing on its exterior surface. The appearance of the tree should have given anyone looking at it notice that it was dead, or nearly so, and decaying .... it is my opinion that the subject tree leaned heavily-10-15 degrees-downhill toward State Route 524.

The arborist further concluded that the tree had been in the highest risk category with imminent failure and high target damage potential because of its proximity to the road. The State rebutted with evidence from the Department of Transportation's maintenance technician who removed the tree after the accident. He testified that the tree "had been a live tree and that its root ball had come loose from the soil owing to the very wet conditions we had in January 2003."

Both the State and the County moved for summary judgment. The trial court granted summary judgment to both defendants because neither had a "duty to look for this readily apparent hazard." The trial court also cited the public duty doctrine as another ground for summary judgment for the State. The judge found that the public duty doctrine did not apply to the County because it served merely as a landowner.

DISCUSSION

When reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court. *Thompson v. Peninsula Sch. Dist.,* 77 Wn.App. 500, 504, 892 P.2d 760 (1995). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The moving party bears this burden of proof. *LaPlante v. State,* 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "A material fact is one upon which the outcome of the litigation depends." *Barrie v. Hosts of Am.,* 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The non-moving party cannot rely on speculation but must assert specific facts to defeat summary judgment. *Seven Gables v. MGM/UA Entm't,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986). All facts and inferences are considered in the light most favorable to the non-moving party. *Ashcraft v. Wallingford,* 17 Wn.App. 853, 854, 565 P.2d 1224 (1977).

I. Duty Based on Constructive Notice

A. *The State's Duty to Maintain the Road*

***2** The State's liability to users of a road is "predicated upon its having notice, either actual or constructive, of the dangerous condition which caused injury, unless the danger was one it should have foreseen and guarded against." *Albin v. Nat'l Bank of Commerce,* 60 Wn.2d 745, 748, 375 P.2d 487 (1962). The Conines concede that the State did not have actual notice but contend that the tree's visibly dangerous condition created constructive notice. The trial court found, as a matter of law, that the defendants lacked constructive notice and granted summary judgment because without actual or constructive notice the defendants had no duty to look for the hazard: "The question then becomes, however, for constructive notice, is there a duty to look for this readily apparent hazard? And under the agreed facts in this case I would find and conclude that there is no duty to inspect for such hazards."

The State agrees with this determination, claiming that it did not have a duty to remove the

defective tree because it lacked notice of the hazard. To support this argument the State relies on *Albin,* stating that the "facts are insufficient, as a matter of law, under *Albin,* to constitute constructive notice that the tree posed a hazard." The State claims that *Albin* is directly on point in this case and prevents liability because the facts are insufficient to constitute constructive notice of a hazardous tree.

"What will constitute constructive notice will vary with time, place, and circumstance." *Albin,* 60 Wn.2d at 748. Constructive notice is generally a question of fact for the jury. *Morton v. Lee,* 75 Wn.2d 393, 397, 450 P.2d 957 (1969). As a result, the determination of constructive notice will differ depending on the factual circumstances of each case. The level of constructive notice required to find a duty is determined by an assessment of two factors-the location of the risk and nature of the risk.

In *Albin,* a tree fell onto a car traveling on a county road during a windstorm. *Albin,* 60 Wn.2d at 747. Like the case at hand, the county did not have actual notice so it could not be held liable unless it had constructive notice that the tree would fall on a passing car. *Id.* at 748. In determining whether the county had constructive notice, the court examined "time, place, and circumstance." During this examination, the court remarked on the similarity of the road to an earlier case with a "somewhat remote mountain road serving but few families." *Id.* (quoting *Mead v. Chelan County,* 112 Wash. 97, 100, 191 P. 825 (1920). In *Mead,* the remote area and limited use of the road created an extremely high threshold for constructive notice. "[I]n the nature of things, the commissioners could not be required to give it constant or even frequent inspection, but might rely upon the users of the road or those living in the neighborhood to give them notice of any unusual conditions which would render the road unsafe." *Mead,* 112 Wash. at 100. The *Albin* court found its road analogous to the road in *Mead* since the road went through "a heavily-wooded, mountainous area" that was "remote and closed by snow during the winter ... used somewhat extensively during the deer and elk hunting season." *Albin,* 60 Wn.2d at 747.

***3** According to these cases, remote, mountainous, sporadically traveled roads require a high threshold for constructive notice of danger to trigger a duty to inspect and remove a dangerous tree. Since the risk of danger to travelers is minimal, the elevated notice requirement strikes an appropriate balance between the need to protect the traveling public and public resources. Otherwise, "[t]he financial burden would be unreasonable, in comparison with the risk involved." *Id.* at 749.

The case at hand presents a significantly different factual scenario. The risk to the traveling public is substantially higher than in *Albin* or *Mead.* The Conines were struck while traveling a highway, State Route 524, through a well traveled area near the City of Lynnwood. Immediately south of the area were apartments and houses, as well as a commercial area including a used car lot, boat dealership, pizza parlor, and two strip malls. The highly traveled road through a residential and commercial area shifts the risk analysis. The duty to safeguard the traveling public requires a lower threshold for constructive notice in well traveled areas.

The Conines introduced expert evidence from an arborist as to the tree's danger to the public. "Since the tree was leaning heavily toward State Route 524, it had a high target damage

potential." According to the expert, targets are people or property that could be injured or damaged by the hazard tree; target assessment depends on the value of structures, public safety like roadways and powerlines, frequency of targets and the nature of the area. Given the frequent targets in this area and the likelihood of large branch failure, the expert gave the tree the highest rating on the scale for target damage potential.

Furthermore, the Conines' arborist testified that the tree "would have looked like a forked snag with no fine or scaffold branches, sloughing bark and fungi growing on its exterior surface. The appearance of the tree should have given anyone looking at it notice that it was dead, or nearly so, and decaying." As a result of its condition, the tree had been "a highly visible hazard for more than two years." The arborist determined that the tree had a hazard potential of five out of five, meaning failure was imminent and immediate removal was necessary. He gave the tree the highest "risk failure rating," nine on a scale of two to nine. In contrast to this evidence, the State's lead maintenance technician, who removed the tree after the accident, provided testimony that the fallen tree "had been a live tree and that its root ball had come loose from the soil owing to the very wet conditions ... in January 2003."

The majority opinion in *Albin* characterized the tree differently, stating the plaintiff produced no evidence "that the tree which fell was any more dangerous than any one of the thousands of trees which line our mountain roads." *Albin,* 60 Wn.2d at 748 .[FN1] Unlike *Albin,* the expert for Conine distinguished the fallen tree from the trees around it. Unlike *Albin,* this was not a remote, rural mountain road which in hunting season was well traveled. The differences between these facts and the *Albin* case preclude a finding that the State lacked constructive notice as a matter of law. Constructive notice of a dangerous tree gives rise to a duty to inspect. Summary judgment was improperly granted on the basis of no duty to inspect.

> FN1. The dissent in *Albin* disagreed, stating that there were three dead snags remaining after completion of logging on the tract of land and that there "is abundant proof that it was dead." *Albin,* 60 Wn.2d at 758. (Foster, J., concurring in part, dissenting in part). The dissent also found that "[t]here is abundant evidence that the Skyline Drive is well traveled, especially so during the open season for elk." *Id.* Had the majority not rejected these facts, the *Albin* decision would control here.

B. *Snohomish County's Duty as the Landowner*

***4** The Conines contend that the County faces liability as the landowner of the property upon which the tree stood because "the owner of land located in or adjacent to an urban or residential area has a duty of reasonable care to prevent defective trees from posing a hazard to others on the adjacent land." *Lewis v. Krussel,* 101 Wn.App. 178, 186, 2 P.3d 486 (2000). The County relies on *Lewis* to rebut its landowner duty, arguing that the tree was a "natural condition of the land."

In *Lewis,* neighbors sued a landowner because their home was damaged when two large hemlock trees fell during a windstorm. *Id.* at 180. Previously, windstorms had knocked down other trees on the land. Expert testimony found that the tree was not diseased and that it was no more

dangerous than any other tree on the property. *Id.* at 181. The court stated "absent [actual or constructive] knowledge, an owner/possessor does not have a duty to remove healthy trees merely because the wind might knock them down." *Id.* at 187.

The County misreads *Lewis*. *Lewis* cites the Restatement as "[t]he traditional rule," that "neither a possessor of land, nor a vendor ... is liable for physical harm caused to others outside of the land by a natural condition of the land." *Lewis,* 101 Wn.App. at 184 (citing Restatement (Second) of Torts, ß 363, cmt. b (1965)). But, this section of the Restatement is not the rule adopted in *Lewis*. Instead, *Lewis* looks to *Albin* and finds a different construction of landowner duty. "[O]ne whose land is located in or adjacent to an urban or residential area and who has actual or constructive knowledge of defects affecting his trees has a duty to take corrective action." *Lewis,* 101 Wn.App. at 187. Thus the County's duty here depends on whether the area was urban or residential and whether the County had constructive notice that the tree was defective.

The County attempts to evade liability by claiming that the tree fell from a parcel of land that is forested and undeveloped as opposed to urban or residential. However, despite its natural state, this land triggers the landowner duty requirements established in *Lewis* because it is urban or adjacent to urban land. The Conines submitted evidence that the land from which the tree fell was either within or just outside the city limits of Lynnwood and zoned "Low-Density Multiple Residential" (LDMR). LDMR is defined as an urban zone. SCC 30.21.025(1)(b)(ii). The Conines also provided declarations describing the urban nature of the area near the County's land. "An apartment complex and single family residences were located immediately to the south followed by a commercial area ... [i]mmediately to the north was a Buddhist temple and single family residences. A trailer park was located atop the embankment to the west, and single family residences were located a short distance from the east side of State Route 524."

The County claims that "the tree at issue in this case was *not* located 'immediately' to the north of single family residences or 'immediately' to the south of the Buddhist temple" but "was situated 45 feet up an embankment, about half-way along an approximately one-half mile forested corridor starting at the Lynnwood commercial area at one end and the Buddhist temple at the other." However, the ability of the tree to negatively impact the adjacent land is the crucial issue, not its exact location on the land. *Lewis,* 101 Wn.App. at 186. The close proximity of the tree to residences and a commercial area, as well as the heavily traveled state highway, distinguishes the urban landscape in this case from the rural landscape in *Albin,* and raises questions of fact as to this element of the duty test.

***5** Actual or constructive notice of a defective tree and the hazard it poses to the neighboring property create the landowner's duty to inspect and remove the tree. The defect must be "readily observable" to enable the landowner to remove the danger. *Id.* at 187. "Actual or constructive notice of a 'patent danger' is an essential component of the duty of reasonable care. Absent such notice, the landowner is under no duty to 'consistently and constantly' check for defects." *Lewis,* 101 Wn.App. at 186-87 (internal citations omitted). Since the Conines concede that the County did not have actual notice of the danger posed by the tree, the County can only face liability based on constructive notice. The Conines produced expert evidence that the subject tree was

obviously dead or dying and leaning for two years, that it looked like a forked snag and that it lacked fine or scaffold branches. This evidence creates an issue of material fact as to whether the tree was in a defective condition and the condition was of sufficient visibility and duration to give the County constructive notice of a potential hazard. Summary judgment was improperly granted.

II. Public Duty Doctrine

"The public duty doctrine requires that the defendant owe a specific duty to the injured plaintiff rather than to the public in general." *Burnett v. Tacoma City Light,* 124 Wn.App. 550, 561, 104 P.3d 677 (2004). "There are four exceptions to the public duty doctrine: (1) legislative intent, (2) special relationship, (3) volunteer rescue, and (4) failure to enforce." *Id.* at 562. The Conines argue that the legislative intent exception prevents the State from denying liability under the public duty doctrine. The legislative intent exception applies "when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons." *Bailey v. Forks,* 108 Wn.2d 262, 268, 737 P.2d 1257 (1987).

A. *The State's Liability Under the Public Duty Doctrine*

The trial court found the public duty doctrine as a secondary rationale for granting the State's motion for summary judgment. "[A]lthough the statute [FN2] gives the state the power to go on to private property to remove hazards, it seems to me that the public duty doctrine would apply in this regard. And that is that it's a general duty, not specific to the particular plaintiffs in this case ." However, the trial court erred in this determination because the public duty doctrine does not apply to maintenance of the roads.

FN2. RCW 47.32.130(1)

The public entity responsible for the roads has a duty to maintain its roads in such a condition that they are reasonably safe for ordinary travel. *Keller v. City of Spokane,* 146 Wn.2d 237, 254, 44 P.3d 845 (2002).

> [W]here ... a city has exclusive control and management of its streets, with power to raise money for their construction and repair, a duty ... arises to the public from the character of the powers granted to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and that it is liable to respond in damages to those injured by a neglect to perform such duty.

***6** *Sutton v. Snohomish,* 11 Wash. 24, 28, 39 P. 273 (1895). The duty is well established and longstanding. *See, Hewitt v. City of Seattle,* 62 Wash. 377, 379, 113 P. 1084 (1911); *Keller,* 146 Wn.2d 237, 248; *Ruff v. County of King,* 125 Wn.2d 697, 704, 887 P.2d 886 (1995); *McCluskey v. Handorff-Sherman,* 125 Wn.2d 1, 6, 882 P.2d 157 (1994); (State has a duty to exercise ordinary care in the repair and maintenance of public highways); *Stewart v. State,* 92 Wn.2d 285, 299, 597 P.2d 101 (1979); *Meabon v. State,* 1 Wn.App. 824, 827, 463 P.2d 789 (1970); *Berglund*

v. Spokane County, 4 Wn.2d 309, 313, 103 P.2d 355 (1940).

The public duty doctrine developed in the 1970's as a rejection of liability for government regulation. "[N]egligent performance of a governmental police power duty enacted for the benefit of the general public imposes no municipal liability running to individual members of the public." *Georges v. Tudor,* 16 Wn.App. 407, 410, 556 P.2d 564 (1976). The doctrine only applies to governmental functions; it does not apply when a government performs a proprietary function. *Borden v. City of Olympia,* 113 Wn.App. 359, 371, 53 P.3d 1020 (2002). The "ownership, control, and supervision" of streets is a governmental function for which public entities are immune. However, the *maintenance* of roads has been defined as a proprietary function for which public entities can face liability. "[T]he duty of a city to keep streets in repair was not a governmental but a ministerial duty, and for a breach thereof an action will lie in favor of a person injured as a result of such negligence." *Hewitt,* 62 Wash. at 379. Consequently, the public duty doctrine does not govern liability for maintenance of roads. The case law bears this out, imposing the duty to maintain the roads on the state, cities and counties without reference to the public duty doctrine even after its emergence in case law. *See, e.g., McCluskey,* 125 Wn.2d at 6; *Stewart,* 92 Wn.2d at 300; *Keller,* 146 Wn.2d at 248-49; *Ruff,* 125 Wn.2d at 704; *Bird v. Walton,* 69 Wn.App. 366, 368, 848 P.2d 1298 (1993).

Maintaining the roads in a safe condition would seem to encompass keeping them free from the risk of motorists driving into fallen trees and free from the risk of trees falling on motorists using the roads. The public duty doctrine does not apply to the maintenance of roadways. Given the case law, the trial court erred in finding the public duty doctrine as a basis for granting summary judgment for the State.

B. *Public Duty Doctrine and Snohomish County as Landowner*

The County argues that the public duty doctrine serves as an alternate basis for summary judgment because the decisions about the maintenance of government land are discretionary governmental acts. The trial court disagreed with the County's assertion of the public duty doctrine. "As to the county, I do not think the public duty doctrine is applicable. The county was not acting in any sort of governmental activity or function in terms of the ownership of this property other than it's a public entity owned property. Therefore, it's held to the same standard as would a private landowner."

***7** "The public duty doctrine does not apply ... when a government performs a proprietary function." *Borden,* 113 Wn.App. at 371. "The principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity." *Okeson v. City of Seattle,* 150 Wn.2d 540, 550, 78 P.3d 1279 (2003). The County has not provided evidence to establish the governmental nature of its ownership of the property. Without such evidence, and considering the summary judgment standard requiring all inferences in favor of the Conines, the County's ownership of the land must be assumed to be proprietary instead of governmental. Ownership of the property in a proprietary capacity exposes the County to liability.

The County relies upon *Sager v. Portland,* for the proposition that maintaining a sidewalk is a proprietary act while deciding whether or when to maintain a sidewalk is a governmental function. *Sager v. Portland,* 684 P.2d 600, 603-05 (1984). In *Sager,* a pedestrian tripped on a defective sidewalk and sued the city for negligent maintenance of the sidewalk. *Id.* at 601. The city had a statutory duty to inspect the sidewalk and notify adjoining owners of any defects requiring repair, but did not own the sidewalk at issue. *Id.* at 601, 604-05. The court determined that the maintenance of sidewalks was proprietary, but the decision to inspect the sidewalks involved a balancing of priorities and funds more like a discretionary, governmental act. As a result, the city was immune from liability for its decision not to inspect the sidewalks.

Sager is distinguishable from this case. In this case, the County's duty arises from its role as the landowner. The County's role is more akin to property owners required to repair the abutting sidewalk if given notice of a defect. *Id.* at 602. Upkeep of the land, like the repair of the sidewalk rests with the landowner. This maintenance is a proprietary function. If the County has only a proprietary, not governmental, role in the ownership of the property, the public duty doctrine does not apply and the trial court erred in granting summary judgment.

III. Opposition Evidence

The State also contends that the Conines have failed to introduce admissible evidence in opposition to the summary judgment motion. The trial court denied the State's motion to strike the expert evidence and the State does not cross-appeal this denial. The State argues that it is entitled to argue any grounds supported by the record to sustain the trial court's order; it was not required to cross-appeal this issue because it seeks no affirmative relief. *State v. Bobic,* 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000).

Evidentiary rulings are reviewed for abuse of discretion. *State v. Finch,* 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Absent an abuse of discretion, the appellate court does not disturb on appeal a trial court's rulings on motions in limine, the admissibility of evidence, and the admissibility and scope of expert testimony. *See Gammon v. Clark Equip.,* 38 Wn.App. 274, 286, 686 P.2d 1102 (1984); *Hume v.. Am. Disposal,* 124 Wn.2d 656, 666, 880 P.2d 988 (1994).

***8** Expert testimony is admissible under Wash ER 702 if the witness qualifies as an expert and the testimony would be helpful to the trier of fact. *State v. Riker,* 123 Wn.2d 351, 364, 869 P.2d 43 (1994). Once admitted, the trier of fact determines the weight of the evidence. *Segall v. Ben's Truck Parts,* 5 Wn.App. 482, 483, 488 P.2d 790 (1971). The Conines' expert is a certified arborist who has qualified and testified as an expert in several lawsuits. His testimony includes information helpful to the trier of fact in determining the appearance of the subject tree.

The State and County both allege, but provide no actual evidence, that the examined tree remains are not those of the tree that fell onto the Conines' car. The State argues the expert testimony is

inadmissible because the tree described in the expert's report is not the correct tree, the expert does not describe his methods for determining the tree, and the report analyzes a tree with only "a wholly speculative connection to the Conines' accident." The County contends that the remains of the tree provided insufficient basis for formulating an opinion. However, the Conines' arborist stated in his declaration that an "examination of the selected portions of the tree is sufficient to draw conclusions regarding the remainder of the tree." The Conines' arborist appears to have sufficient expertise to qualify as an expert, and the helpfulness of the testimony has not been challenged. Disagreement between the plaintiff and defense experts goes to the weight, not the admissibility, of the evidence. The trial court did not abuse its discretion in admitting the evidence.

IV. Public Policy

Both the State and the County contend that public policy should preclude liability and reversal of the summary judgment. The State claims that liability in this case would require "cutting a swath through wooded areas, having a width on each side of the traveled portion of the road equivalent to the height of the tallest trees adjacent to the highway," quoting *Albin,* 60 Wn.2d at 748-49. The County similarly states that "to impose a duty on the County in this case would in effect impose a duty to inspect every tree in its possession: a duty which is neither feasible nor supported by Washington law." However, these arguments go too far and do not assist in the disposition of this appeal. The difficulties of detecting and removing the downed tree pertain to the standard of care-did the defendants act reasonably in their maintenance of the road and land? The jury should have an opportunity to determine if the parties had constructive notice of the defective tree. Given that constructive notice is situational and fact-based, jurors may conclude the facts do not allow for such a finding. Even if a jury determines the defendants had constructive notice, it may find that their maintenance efforts were sufficient and that they acted with reasonable care so are not liable for the Conines' damages.

***9** Regardless of the potential outcome at trial, the court granted summary judgment based on an improper conclusion that the defendants had no constructive knowledge as a matter of law or were immune to liability and therefore had no duty to remove the defective tree. These determinations should have been left to a trier of fact. We reverse the summary judgments in favor of both the State and the County.

WE CONCUR: Dwyer, J., and BECKER, J.