

CASE NO. A08-750

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**State of Minnesota**  
**In Court of Appeals**

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JOAN M. KRIEGER,

*Respondent,*

vs.

CITY OF ST. PAUL,

*Appellant.*

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**APPELLANT'S REPLY BRIEF AND APPENDIX**

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JOHN J. CHOI  
Saint Paul City Attorney  
LAWRENCE J. HAYES, JR.  
Attorney Reg. No. 42821  
Asst. Saint Paul City Attorney  
750 City Hall and Court House  
15 West Kellogg Boulevard  
Saint Paul, Minnesota 55102  
(651) 266-8728

*Attorneys for Appellant*

FLUEGEL LAW OFFICE  
Wilbur W. Fluegel  
Attorney Reg. No. 30429  
150 South 5<sup>th</sup> Street  
Suite 3475  
Minneapolis, Minnesota 55402  
(612) 238-3540

FELLMAN LAW OFFICE  
Mark J. Fellman  
Attorney Reg. No. 0028782  
400 Robert Street North  
Suite 1740  
St. Paul, Minnesota 55101  
(651) 225-5600

*Attorneys for Respondent*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE FACTS

Plaintiff's Statement of the Facts as indicated in her Appeal Brief relies primarily upon the Affidavit of Plaintiff's expert Raymond Arntson. In paragraph 5 of his Affidavit (RA-003), Mr. Arntson stated as follows:

Based on information available to me, it appears with reasonable probability, through the course of a construction and/or remodeling project at Northdale Community Center, 1414 North St. Albans in St. Paul, that a gouge, indentation or "hole" was created in the temporary bituminous walkway from an adjacent parking lot to with [sic] the public building owned by the City of St. Paul, and that while leaving the building during an evening after teaching a community education class, given the limited lighting available to her, Plaintiff Joan Krieger encountered the gouge, indentation or hole in the temporary bituminous walkway resulting in tripping and sustaining an injury.

At page 9 of her brief, Plaintiff in footnote 9 states that the City disputed that Plaintiff established a *prima facie* case of defect in the sidewalk or how the hole that tripped the Plaintiff had been created. Plaintiff then stated: "Plaintiff established this by the expert affidavit of a Certified Safety Professional named Raymond Arntson. The adequacy of his foundation or reliability of his opinion are not challenged in the City's interlocutory appeal." This is a misstatement of the City's position. The City maintains that the Plaintiff has failed to demonstrate based on the record that she is entitled to denial of Defendant City's Motion for Summary Judgment. The Plaintiff concedes at page 13 of her brief that it is her burden to establish each of the factual elements of § 335 to defeat a claim of immunity; (1) that the landlord created or maintained an artificial condition on the land, (2) which to the landlord's knowledge was likely to cause death or serious

bodily harm, (3) which was of such a nature that the landlord believed that trespassers would not discover it, and (4) that the possessor failed to exercise reasonable care to warn trespassers of the condition and the risk involved. RESTATEMENT (SECOND) OF TORTS § 335 (1965).

Defendant has denied that it created or maintained a dangerous artificial condition in the form of a gouge or hole in the sidewalk. It is undisputed that Plaintiff in her deposition testified that she never saw the alleged defect but merely felt it with her foot. No photographs were ever taken of the alleged defect. The temporary sidewalk in which the alleged gouge was located was replaced by a permanent sidewalk several months after the accident date. Plaintiff's husband Gerald Krieger as testified that after his wife's accident, he observed bobcat-like equipment cause a gouge or some type of defect in the temporary asphalt. He also stated that after his wife's accident, an orange cone was placed over the asphalt defect.

An expert's opinion should not be accepted if the opinion is based on speculation. The court in the case of *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 155 (Minn. 1982) stated that an expert must base his opinions on facts sufficient to form an adequate foundation. When a substantial time has passed between the date of an accident and the date of an expert's examination, an expert's opinion may be admissible if the condition has not substantially changed since the time of the incident at issue. *See Bohach v. Thompson*, 307 Minn. 332, 337, 239 N.W.2d 764, 767 (1976). The record is devoid of

any facts which demonstrate the existence of the gouge or hole in the temporary sidewalk prior to Plaintiff's accident. Plaintiff's expert Mr. Arntson in his affidavit does not claim to have inspected the accident area. It is apparent that Mr. Arntson has speculated based on information provided by Gerald Krieger that bobcat-type machinery may have created a gouge prior to Ms. Krieger's accident. This speculative and unreliable opinion-making by Mr. Arntson should be rejected by this Court.

At footnote 4 of page 5 of Plaintiff's brief, Plaintiff denies that she made a claim of inadequate lighting in her Complaint, but states that inadequate lighting "should simply be taken into account as an explanation as to why she did not detect the hazard upon exiting the building in the dark, and not as the basis for a claim against the City itself." However, Plaintiff's Complaint and Amended Complaint clearly state that despite actual notice of a hazard posed by the absence of exterior lighting, the City allowed contractors it had hired to create hazards at the site of the building grounds during the course of the construction project. Plaintiff in paragraph 14 of her Complaint states in summary fashion that she sustained injuries as a direct and proximate result of Defendant's negligence. A fair interpretation of the language of the Complaint would support the conclusion that Plaintiff was alleging that inadequate lighting was at least one of her negligence claims.

At page 6, item 12 of her brief, Plaintiff states: "Both trial courts concluded that since the facility was used regularly by the elderly, whether or not the City should

anticipate that they could be seriously injured in a fall was a fact issue for the jury.” The City has attached to its original Brief copies of Judge Warner’s September 6, 2007, Order and Memorandum and Judge Wheeler’s April 22, 2008, Memorandum and Order. Plaintiff misstates the language contained in these documents. A 96, 248. Neither Order and/or Memorandum indicate that because the City’s facility was regularly used by the elderly, the City should have anticipated a serious fall-related injury.

Regarding the City’s recreational immunity claim, Judge Warner at page 9 of her memorandum commented as follows: “This Court must view the facts in a light most favorable to Plaintiff. Plaintiff has presented evidence that brings into question the sufficiency of the lighting at the time she tripped and fell. With little to no evidence regarding the gouge itself, this Court cannot conclude, as a matter of law, that the gouge was not hidden, or that a brief inspection would have revealed it. This should be properly determined by the trier of fact.” A 104. Judge Warner did not address the other necessary elements of proof that Plaintiff had to establish to defeat an immunity claim. In particular, Judge Warner did not reference a subjective standard of proof raising the duty of a landlord to elderly entrants based on their particular infirmities.

Judge Wheeler’s April 22, 2008, Order and Memorandum indicated at page 9 that there was question of fact to what if any depression or defect was in the temporary asphalt sidewalk. A 256. Again, Judge Wheeler did not expressly reference a subjective standard based on the landlord’s knowledge that elderly users frequented its facility.

## ARGUMENT

### 1. **The Trial Court Erred in Denying the City's Claim for Recreational Immunity.**

In her brief at page 13, Plaintiff admitted that she as an entrant bore the burden of proof in regard to each of the factual elements of § 335 that needed to be established in the record to defeat a claim of immunity. RESTATEMENT (SECOND) OF TORTS § 335 (1965). At page 14 of her brief, Plaintiff states: "The only element disputed by the City was whether the gouge mark was 'likely' to cause death or serious bodily harm." This is a misstatement of the City's legal position.

Plaintiff has failed to establish that the City either created or maintained the gouge or hole that was allegedly in the sidewalk at the time of Plaintiff's fall. As discussed above, the record as a whole does not support Plaintiff's claim in this regard. Plaintiff contends that the alleged defect was created by an unknown third party operator of bobcat machinery. In order for the City to have maintained the defect, it would have had to have actual knowledge of its existence. Plaintiff concedes that there is no proof in the record to demonstrate actual knowledge on the part of the City. Instead, Plaintiff claims constructive notice to the City of the alleged defect at page 15 of her brief based upon an April 16, 2003, Certificate of Substantial Completion along with an August 2005 punch list. The record does not support Plaintiff's claim of constructive notice where Plaintiff's husband did not observe bobcat-type machinery scraping a bucket across the surface of the temporary sidewalk until after Plaintiff's accident.

At page 14 of her brief, Plaintiff argues that the decision entitled *Johnson v. State*, 478 N.W.2d 769 (Minn. Ct. App. 1981) is inapplicable. Plaintiff noted that the City had cited the *Johnson* decision in its Motions for Summary Judgment that were heard by Judge Warner and Judge Wheeler. Plaintiff then states at page 14 the following: “The argument failed twice because the judges recognized that here we are dealing with some fairly aged users of the property who enter to attend (or teach) various community education classes, like Mrs. Krieger’s quilting class. The 78 year-old fell and was badly hurt. To the extent that elderly patrons regularly use the facility creates the need for the government to be aware that people who could sustain the life-threatening injury of a fractured hip would be using the grounds.” As previously referenced, Plaintiff’s argument is a misstatement of the language of the Orders issued by Judge Warner and Judge Wheeler. Neither judge acknowledged a subjective standard for elderly users which increased a landlord’s duty to them.

At page 14 of her brief, Plaintiff states: “The core concept of premises liability is that a duty of reasonable care *under the circumstances* is exacted of possessors. See *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972).” The *Peterson* decision cited by Plaintiff did not address the issue of recreational immunity. In fact, the *Peterson* decision established that the duty of a landowner to inspect, repair or warn those who come upon the land as licensees or invitees would be decided by the same test of

reasonable care. This case did not address in any way the elements of proof that a plaintiff needs to satisfy in order to overcome a recreational immunity defense.

At pages 14 and 15 of Plaintiff's brief, she argued as follows: "Given the proof of the *circumstances* of entry and of the age of entrants, the trial judges both felt that a *prima facie* showing was made by Plaintiff that the risk of serious bodily injury existed here, whereas it did not in a daylight fall on an open and obvious raised sidewalk joint to healthy entrants in *Johnson*." Contrary to Plaintiff's characterization, the *Johnson* decision did not discuss the health and age of the female patron who tripped over a raised sidewalk joint. Nor has the Plaintiff cited any legal authority (including the trial courts' orders) in support of her claim that the risk of serious bodily injury should be assumed if a patron is elderly.

At footnote 13 of page 16 of Plaintiff's brief, Plaintiff noted that the court in the case entitled *Noland v. Soo Line R.R. Co.*, 474 N.W.2d 4, 6 (Minn. Ct. App. 1991), applied a constructive knowledge standard to § 335(a)(ii). Plaintiff then claims that the Minnesota Court of Appeals "altered course" after this decision from its previous requirement that a claimant demonstrate actual knowledge to the landlord of a risk that a hazard could cause serious bodily harm or death.

The *Noland* decision is distinguishable from the present case. The factual background in *Noland* involved a trespasser who drove her snowmobile over the side of a railroad trestle which was suspended above a creek. 474 N.W.2d at 5. The court

indicated that defendant Soo Line knew that the trestle was used by trespassers and should have known that it was dangerous. *Noland*, 474 N.W.2d at 6. The court noted that the plaintiff in the *Noland* case had never been in the accident area prior to her accident. *Id.* at 7.

In the present case, Plaintiff admitted that she was present on the sidewalk approximately six times during the fall of 2003 prior to her accident. Even assuming for the sake of argument that the City had constructive notice of a defect in the sidewalk, said knowledge would not place the City on notice that Plaintiff might sustain a serious bodily injury or death as a result of the sidewalk defect. The potential for serious injury to trespassers was obviously much greater in the *Noland* case where the defendant had knowledge of trespassing snowmobilers on the trestle and where the trestle in question was in a raised condition above a creek.

There have been a number of Court of Appeal's decisions referencing the *Noland* decision since it was issued. Attached hereto at A 285-289 is a copy of an unpublished decision of the Minnesota Court of Appeals filed April 8, 2008, in the case entitled *Sandford v. City of Hopkins*. No. A07-556, 2008 LEXIS 346 (Minn. Ct. App. April 8, 2008). The *Sandford* court reversed a trial court denying the City of Hopkins' motion for summary judgment. In particular, the Court of Appeals noted that a City may be held liable for its conduct under the recreational use immunity statute only if the artificial condition is likely to cause death or serious bodily harm, that the landowner had actual

knowledge of that danger, and that the danger was concealed or hidden from the trespasser. *Sandford*, No. A07-556, 2008 LEXIS 346 at \*5, A 287. Regarding the first factor, the court noted that the plaintiff skater who was injured on an ice rink had not established that his accident was comparable to the inherently dangerous conditions described in cases involving high voltage electrical wires or excavations. *Id.* at \*7, A 287. The *Sandford* court cited approvingly the *Johnson* decision in this regard. The court then commented: “The remote possibility that death or serious bodily harm might result from an ice skating accident due to a flaw or irregularity in the surface of the ice does not mean that it is likely to happen.” *Id.* That reasoning is especially applicable to the present case where Plaintiff never fell, but merely lost her balance temporarily before regaining her balance.

The *Sandford* court noted that the district court had concluded that the City of Hopkins had constructive and actual knowledge of the dangers posed by sloping ice near the rink’s edge. *Id.* at \*11, A 288. The *Sanford* court then commented:

The city argues that “actual knowledge” is required and that the record does not contain evidence that the city had actual knowledge of the condition of the ice or the risk, if any, of death or serious bodily harm to persons skating on the rink. This court has held that a plaintiff must prove “actual knowledge” to avoid a finding of recreational-use immunity. *Lundstrom*, 587 N.W.2d at 520; *Cobb v. State*, 441 N.W.2d 839, 841 (Minn. Ct. App. 1989); *but see Noland v. Soo Line R.R., Co.*, 474 N.W.2d 4, 6 (Minn. Ct. App. 1991) (inquiring whether landowner “realized or should have realized the potential danger” rather than requiring “actual knowledge”), *review denied* (Minn. Sept. 13, 1991).

*Id.* at \*11, A 288.

As in the present case, the *Sandford* court noted that the City of Hopkins had no actual knowledge of a condition likely to cause serious bodily harm. The *Sandford* court also indicated that there were no complaints about the alleged dangerous condition prior to plaintiff Sandford's accident. *Id.* at \*12, A 288. The court then commented: "Accordingly, even if there were a likelihood of death or serious bodily harm, the evidence is insufficient as a matter of law to prove that the city had actual knowledge of the condition of the ice or the likelihood of death or serious bodily harm." *Id.* at \*12, \*13, A 288. Thus, this most recent decision of the Minnesota Court of Appeals addressing the appropriate standard of notice has held that the plaintiff must demonstrate actual notice to a governmental entity regarding the existence of a dangerous condition likely to cause death or serious bodily harm. Plaintiff has failed to meet her required standard of proof here.

Interestingly, the *Sandford* case also rejected plaintiff's expert witness affidavit as containing only conclusory statements which did not create a fact issue precluding summary judgment. *Id.* at \*10, A 288. This reasoning applies to Plaintiff Arntson's Affidavit as well.

Attached hereto at A 290-293 is a copy of an unpublished decision of the Court of Appeals entitled *Mertz v. City of Eden Prairie* filed August 5, 1997. No. C6-97-30, 1997 LEXIS 861 (Minn. Ct. App. Aug. 5, 1997). In that case, a child went sledding in the park after park hours and without lights on the sledding hill, crashed into a fence and was

injured. The Court of Appeals affirmed a judgment of the trial court that the city had no liability because it had no actual knowledge that the temporary fence was likely to cause likely harm to a trespasser. *Id.*, A 290. In the *Mertz* decision, testimony of city officials was referenced to the effect that they acknowledged the possibility of injury if a person hit the fence. *Id.* at \*7, A 292. The court held that this evidence was insufficient to meet the plaintiff's burden of proving that the city had knowledge that the fence was likely to cause death or serious bodily injury, citing the *Johnson* decision. *Id.*

Enclosed herewith at A 294-296 is an unpublished decision of the Minnesota Court of Appeals entitled *Abrahamson v. County of St. Louis*, filed December 14, 1999. No. C1-99-828, 1999 LEXIS 1329 (Minn. Ct. App. Dec. 14, 1999). In that case, the plaintiff was injured when his all terrain vehicle tipped over while he was driving on recreational land. *Id.* at \*2, A 295. The *Abrahamson* court in finding that recreational immunity applied made the following comment:

A landowner is liable only where it realizes or should realize an artificial condition will involve a risk of death or serious bodily harm. *Noland v. Soo Line, R.R.*, 474 N.W.2d 4, 6 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991). The possibility that serious harm might result is not sufficient. *Johnson v. State*, 478 N.W.2d 769, 773 (Minn. App. 1991) (holding serious harm was not likely to result from a raised sidewalk joint), *review denied* (Minn. Feb. 27, 1992). Conditions found likely to cause death or serious bodily harm generally have inherently dangerous propensities, such as high voltage electrical wires. *Id.*

Appellant failed to prove any probative evidence that respondent knew or should have known that holes on its property were likely to cause death or serious injury. There is no evidence that respondent had knowledge of any previous accidents. Moreover, the fact that appellant suffered a serious injury is not sufficient evidence to establish serious injury

was likely to occur. *See Id.* Finally, we note that under the trespasser standard of liability, appellant was required to be alert to conditions on the land. *See Sirek by Beaumasters v. State, Dep't. of Natural Resources*, 496 N.W.2d 807, 812 (Minn. 1993).

*Id.* at \*5, \*6, A 295-296 (emphasis in the original).

This reasoning is applicable to the case at hand where the City of St. Paul had no previous knowledge of accidents or injuries on the sidewalk in question, and where the *Johnson* case cited approvingly by the *Abrahamson* court held that serious harm was not likely to result from a sidewalk defect. *Id.* The City is entitled to an order reversing the trial court denial of recreational immunity and affirming the City's entitlement to dismissal from suit based on that defense.

**2. The Trial Court Erred in Denying the City's Claim for Statutory (Discretionary) Immunity.**

Plaintiff in her brief argues that there has been no evidence submitted by the City that it balanced financial, political, economic and/or social effects of a plan or policy "in deciding not to place a cone on the gouge mark." Plaintiff's Brief, p.18. Plaintiff also argues the absence of evidence demonstrating that the City weighed and balanced the cost of a orange cone to be placed over the gouge. Plaintiff alleged in her Complaint that there was inadequate lighting in the area of the accident. Since that time, Plaintiff has conceded that the City is entitled to discretionary immunity regarding its decision to limit exterior lighting at the recreational facility.

In an effort to avoid dismissal of her lawsuit, Plaintiff now claims that the only discretionary act to which immunity might apply would be a decision to place a warning cone on the alleged sidewalk defect. Plaintiff concedes that the City did not have actual knowledge of a defect, but argues based on the conclusory statements of her expert Mr. Arntson that there was a defect in the sidewalk predating the accident. There is a complete absence of proof on this issue. Plaintiff herself never saw the alleged defect but merely felt it with her foot. She never photographed the condition. Plaintiff's failure to be able to describe the defect and identified as being in existence prior to her accident are fatal to her claim.

The decision-making process of Brian Tourtelotte, the City Architect, who addressed the lighting issue involved the balancing of financial, political, economic and social effects; therefore, the City is entitled to protection under statutory immunity.

**3. The Trial Court Erred in Denying the City's Claim Based Upon the Doctrine of Official Immunity.**

Plaintiff has argued that official immunity does not apply because the City did not consider placing a warning cone over a tripping hazard. Defendant City incorporates its previous arguments and notes that there is no credible evidence that a tripping hazard existed prior to the Plaintiff's accident. Official immunity applies to Brian Tourtelotte's discretionary decision not to add exterior lighting in the area where Plaintiff claims to have fallen. Plaintiff concedes that the City as employer may be entitled to vicarious official immunity even though Plaintiff has failed to name Mr. Tourtelotte as an

individual Defendant to this litigation. As Mr. Tourtelotte's discretionary decision was made without malice, his employer City of St. Paul is protected from suit under the doctrine of vicarious official immunity.

### CONCLUSION

Appellant City of St. Paul is entitled to dismissal of Plaintiff's lawsuit against it based upon recreational immunity pursuant to MINN. STAT. § 466.03, subd. 6(e). The record in this case establishes that the City had no notice of a dangerous condition likely to cause death or serious bodily injury. In addition, the City is entitled to immunity from suit based upon statutory (discretionary) immunity pursuant to MINN. STAT. § 466.03, subd. 6. Finally, Plaintiff's lawsuit against the City should be dismissed based upon the doctrine of official immunity as well as the doctrine of vicarious official immunity.

Date: July 11, 2008

JOHN J. CHOI  
Saint Paul City Attorney

  
LAWRENCE J. HAYES, JR., #42821  
Assistant City Attorney  
750 City Hall and Courthouse  
15 West Kellogg Boulevard  
St. Paul, MN 55102  
(651) 266-8728  
*Attorneys for Appellant City of St. Paul*