**IN THE UNITED STATES DISTRICT COURT**

**FOR THE WESTERN DISTRICT OF VIRGINIA**

**Lynchburg Division**

**LYNN SMITH, )**

 **)**

 **Plaintiff, )**

 **)**

**v. ) Case No. 5:02cv18975**

 **)**

**CITY OF LYNCHBURG, )**

 **)**

 **Defendant. )**

**Memorandum in Support of Plaintiff’s Motion**

**for Partial Summary Judgment**

1. **Introduction**

Lynn Smith is entitled to partial summary judgment concerning the defendant’s sovereign immunity and plaintiff’s alleged contributory negligence. Routine street maintenance is a proprietary function of municipalities and does not afford them sovereign immunity. Smith v. Town of Front Royal, 61 Va. Cir. 5, 6 (2003). At the time of Ms. Smith’s injury, the City of Lynchburg was performing routine street maintenance as the recent storm no longer required “immediate government action.” Whether someone was contributorily negligent is a question for the jury unless “reasonable minds could not differ.” Ravenwood Towers, Inc. v. Woodyard, 244 Va. 51, 57 (1992). Reasonable minds could differ about whether Ms. Smith was exercising ordinary care and whether the branch lying in the street was an open and obvious defect that a person exercising ordinary care would have seen.

1. **Statement of facts**

Lynn Smith was walking across the street to her car to go home on July 4, 2017, when a branch that was left by the City of Lynchburg caused her to fall. (Compl. ¶ 8, 9.) This occurred after a stressful incident at a local fireworks tent. (Smith Dep. at 10.) The route to her car took her across the grass field, a sidewalk, and Jefferson Street. (Smith Dep. at 15.) Between 9:15 and 9:20 that evening, Ms. Smith crossed Jefferson Street at the intersection while walking quickly. (Stipulated Facts ¶ 8; Smith Dep. at 16.) This intersection had a curb on the part of the intersection where she crossed. (Smith Dep. at 15.) Although she had looked at the curb while approaching it, she did not look down while she was stepping off it. (Smith Dep. at 16.) It was after sunset and getting dark, but not completely dark yet. (Stipulated Facts ¶ 9.) A car was approaching, but was still over 100 yards away. (Smith Dep. at 16.) While stepping off the curb, Ms. Smith she stepped onto a tree limb eight inches in circumference lying in the intersection against the curb. (Compl. ¶ 8.; Stipulated Facts ¶ 2; Smith Dep. at 19.) When she stepped on the branch, she tripped and fell into the street, causing a broken leg and other injuries. (Compl. ¶ 9.) The crosswalk was within the City of Lynchburg and therefore municipal control. (Stipulated Facts ¶ 5.)

The branch had been cut by City workers as part of the clean-up operation for a storm that had occurred on June 26, 2017. (Stipulated Facts ¶ 6.) This storm had severe thunderstorms, torrential rain, and strong winds. (Certification of Weather Data.) The damage included forty-five trees being blown down in the downtown area and blocking city streets and sidewalks. (Young Aff. ¶ 4, 5.) The day after, June 27, 2017, the City began clean-up operations for the area. (Young Aff. 7.) This process involved having some crews cut down trees, limbs, and branches and stack them beside the road while other crews came to collect them later. (Young Aff. ¶ 8.) They were to stack them in the grass strip between the street and sidewalk when possible and in the street when there was not grass to do so. (Young Aff. ¶ 8.)

Dottie Davis, the Administrative Assistant to the Director of Public Works, drove down Jefferson Street on June 29 and saw the city’s cleanup operations there. (Davis Aff. ¶ 13, 14.) There, she saw a branch fall off a loaded truck and land near the curb but assumed one of the near-by work crews would pick it up. (Davis Aff. ¶ 15, 16.) The work crews worked 12-hour shifts under the City’s emergency response plan with the goal of getting the streets and sidewalks in the Downtown area cleared and cleaned-up for the annual Fourth of July celebration. (Young Aff. ¶ 6, 7.) This schedule lasted until July 1 when Boyd Young, the Director of Public Works, deemed it to be “substantially completed,” at which point they resumed their regular work schedules. (Young Aff. ¶ 9.)

1. **summary Judgment Standard**

Summary judgment is appropriate when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Summary judgment must be entered when the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

 “In determining whether a genuine issue of material fact exists, [a Federal Court] must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). “[T]o demonstrate a genuine issue of fact, the non-moving party must do more than raise some metaphysical doubt as to the material facts; the non-moving party must come forward with specific facts showing that there is a genuine issue for trial.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

1. **Argument**

Plaintiff, Mrs. Smith, should be granted her motion for partial summary judgment because the City of Lynchburg is not covered by sovereign immunity, had notice of the defect, and Ms. Smith was not contributorily negligent as a matter of law. Emergency cleanup is only a governmental function while it requires “immediate governmental action to restore vital services to the public;”afterward, routine maintenance of city streets and sidewalks is a proprietary function and therefore not covered by sovereign immunity. Gambrell v. City of Norfolk, 60 Va. Cir. 328, 333 (2002); Port Royal 61 Va. Cir. at 6. Lynchburg had returned to routine street maintenance when vital services were restored to the public. A city has constructive notice of a defect in its property if the defect “existed for such length of time that proper diligence would have discovered it” or if it arose from “the direct act of the corporate authorities or its agents.” West v. City of Portsmouth, 196 Va. 510, 514 (1954). Lynchburg had both actual and constructive notice when city workers cut the branch and it was seen by Dottie Davis and yet left lying in the street for five days afterward. The only situation in which contributory negligence becomes an issue for a court is when “reasonable minds could not differ about the conclusion to be reached,” such as where the dangerous condition was open and obvious and yet the plaintiff did not exercise reasonable care for his safety under the circumstances. Ravenwood Towers, Inc. v. Woodyard, 244 Va. 51, 57 (1992); Little Creek Inv. Corp. v. Hubbard, 249 Va. 258, 261 (1995). Reasonable minds could differ about the conclusion, so this issue should go to a jury, but if it is not given to a jury, Smith should not be found contributorily negligent as the branch was not an open and obvious defect. Therefore, the court should grant the plaintiff’s motion and deny the defendant’s motion.

1. **The City of Lynchburg Is Not Covered By Sovereign Immunity And Did Not Require Notice**

A municipal corporation “may be liable, just as a private individual or corporation,” for its negligence in carrying out its proprietary functions. Fenon v. Norfolk, 203 Va. 551, 555 (1962). Among these proprietary functions is a city’s duty to maintain the municipal sidewalks. Port Royal, 61 Va. Cir. at 6. Cleanup after a weather emergency is an exception, but its sovereign immunity lasts for only as long as the emergency does. Id. Emergency cleanup is only a governmental function while it requires “immediate governmental action to restore vital services to the public;”afterward, routine maintenance of city streets and sidewalks is a proprietary function and therefore not covered by sovereign immunity. Gambrell v. City of Norfolk, 60 Va. Cir. 328, 333 (2002); Port Royal 61 Va. Cir. at 6. The director of public works for the city said that the work was substantially complete three days before the accident, and the city’s work crews returned to their normal schedules at that time. Then the city held its Fourth of July celebration on the same night that Ms. Smith was injured just down the street. As the city demonstrated, the emergency situation was passed and did not require “immediate governmental action to restore vital services to the public.”

A city has constructive notice of a defect in its property if the defect “existed for such length of time that proper diligence would have discovered it” or if it arose from “the direct act of the corporate authorities or its agents.” West v. City of Portsmouth, 196 Va. 510, 514 (1954). The branch in question was actually cut by the defendant and left on the street. For five days it remained there, even though other work crews were in the area. This shows both that the city did not require notice and that they did have constructive notice. Therefore, the city was acting in a proprietary function, is not covered by governmental immunity, did not require notice, and received constructive notice.

1. **Street maintenance is a proprietary function**

Routine maintenance of city streets and sidewalks is a proprietary function and therefore is not covered by sovereign immunity. Woods v. Marion, 245 Va. 44, 45 (1993). In Woods, the Town of Marion had a water pipe leak onto a street and accumulate ice. Id. This carried on for several weeks without the town repairing the pipe or removing the ice. Id. The ice then caused a truck to skid and collide with Woods’s vehicle. Id.

The court denied the town’s plea of sovereign immunity. Id. at 47. It stated that the routine maintenance of both waterworks and streets was a proprietary function and that proprietary functions were ineligible for sovereign immunity. Id. at 46. It admitted that maintenance could be a governmental function when a municipality was “responding to the emergency weather conditions in opening streets to vital public services” but found that no such condition was present. Id. The court reasoned that since the removal of the ice was routine street maintenance and therefore a proprietary function, the town was not covered by sovereign immunity. Id. at 47.

Like the maintenance of the street in Woods was a proprietary function, so the maintenance of Jefferson Street by the City of Lynchburg was a proprietary function. The court in Woods found no condition to make removing the ice a governmental function. Likewise, no condition exists to make cleaning Lynchburg’s streets a governmental function. Yet the City of Lynchburg did not clean up the branch in their street maintenance, but actually left it there. (Stipulated Facts 6; Davis Aff. ¶ 15.) As street maintenance is a proprietary function, the City of Lynchburg is not shielded by sovereign immunity.

1. **Severe weather cleanup reverts to a proprietary function when immediate governmental action to restore vital services to the public is no longer needed**

Emergency cleanup is a governmental function while it requires “immediate governmental action to restore vital services to the public.” Gambrell, 60 Va. Cir. at 333. In Gambrell, the plaintiff, Gambrell, was told by the City of Norfolk not to park in the municipal parking lot after a snowstorm in the city. Id. at 329. However, the next day the city told Gambrell that the lot had been cleared of ice and snow and was “fit for use.” Id. Gambrell then parked in the lot and slipped walking to the bus stop, seriously injuring herself. Id.

The court held that the city was covered by governmental immunity. Id. at 333. The court stated that it was reasonable for the city to take more than three days to clear the 4.7 inches of snow and that just because the city was no longer working around the clock does not mean that the emergency passed, as there are human limitations preventing such work for an extended period. Id. at 331–33. The court instead based its test for an emergency on the conditions in the city, namely that there were still three inches of snow and temperatures near freezing. Id. at 333. The court said that these conditions still “required immediate governmental action to restore vital services to the public.” Id. (quoting Woods v. Marion, 245 Va. 44 (1993)).

The immediate removal of debris resulting from a major weather emergency to restore vital services is a governmental function. Fenon v. Norfolk, 203 Va. 551, 556 (1962). In Fenon, a hurricane hit the city of Norfolk at 5 a.m. and knocked down over 1,000 trees, approximately 800 of which landed in streets. Id. at 554. While it required two weeks to finish clearing the streets of the trees and other debris, the city assigned 400 employees to clear the streets. Id. Two employees found a large tree in a street but were unable to move it at the time, so they merely trimmed the branches to open one lane and put up a sawhorse in front of it in the other lane. Id. at 554–555. Later that same evening, the car that Fenon was a passenger in struck the barrier and tree trunk, injuring him. Id. at 555.

The court held that the city was protected by sovereign immunity. Id. at 556. While the court acknowledged that street maintenance is ordinarily a proprietary function and therefore not covered, it stated that the removal of debris from such a disaster as the hurricane was a governmental function. The court reasoned that the work was being done to resupply the city with utility services, which was for the common good of all and therefore governmental.

Unlike the conditions in Gambrell requiring immediate governmental action, the conditions in Lynchburg on July 4 did not. In Gambrell, there were still three inches of snow that needed clearing. Ms. Smith still could drive in the city without obstructions, and the City of Lynchburg still held its Fourth of July celebration that same night just down the street, where people used the streets and sidewalks to get to the city’s celebration. (Smith Dep. at 15; Stipulated Facts ¶ 7.) Neither were there utilities out that the city needed to resupply as in Fenon, where many people were without power as a result of the storm. No evidence states that Lynchburg was still restoring power lost in the storm. Smith noted that the street lights at the site had power at the time of the accident. (Smith Dep. at 17.) In addition, in Gambrell, the City of Norfolk had only had three days to clear the 4.7 inches of snow. In Fenon, Norfolk had only 17 hours. The City of Lynchburg had eight days to clear the trees that fell in the downtown area. (Compl. ¶ 7, 8.) Therefore, the immediate governmental action to restore vital services to the people of Lynchburg had ended and street maintenance had reverted to a proprietary function.

Once an emergency no longer requires governmental acts for the common good, a municipality’s street maintenance reverts to a proprietary function and is no longer protected by sovereign immunity. Port Royal, 61 Va. Cir. at 6, 10. In Port Royal, the Town of Port Royal received ten inches of snow. Id. at 5. The town then plowed its streets, creating a large pile of snow obstructing one of its sidewalks. Id. at 6. Four days later, the plaintiff, Charlotte Smith, tried to cross this snow pile by stepping over it, yet tripped in doing so. Id. at 5.

The court denied the town’s plea in bar based on sovereign immunity. Id. at 6, 12. It accepted that clearing the streets during an emergency was a governmental function, but stated that “when the emergency is over, and normal conditions return, then the duties of the municipal government to maintain the streets and sidewalks revert to their former proprietary status.” Id. at 10. The court furthermore stated, “in Virginia, a . . . [municipal corporation] has the positive and non-delegable duty to keep and maintain its streets and sidewalks in repair and in safe condition for public travel . . . [and] is liable for a negligent failure to discharge the duty.” Id. at 6 (quoting Votis v. Ward's Coffee Shop, 217 Va. 652, 654, 231 S.E.2d 236 (1977)). The court reasoned that, since the emergency ended after the city plowed, the town became liable for the streets’ and sidewalks’ conditions when their maintenance reverted to a proprietary duty. Id.

After sufficient time has passed after an emergency, street maintenance will revert from a governmental to a proprietary function, even if the city is still planning to clean up after the emergency. Chiles v. Gray, 37 Va. Cir. 459, 461–462 (1996). In Chiles, a bridge’s sidewalk had been covered with snow and ice despite the city of Richmond having sufficient time to remove it. Id. at 459. Because of the snow and ice on the sidewalk, Chiles walked in the street itself and was struck by a car. Id.

The court overruled the city’s plea of sovereign immunity. Id. at 462. It accepted that coping with an emergency was a governmental function and thus protected by sovereign immunity, but found that there was no evidence that an emergency still existed at the time of the accident. Id. at 461. The court specifically rejected the argument that an emergency lasted as long as it took the city to clean up after it. Id. The court reasoned that this would allow the city to defeat all personal injury claims made against it even years after such an “emergency decision” and therefore that the time between a storm and an accident was an important consideration. Id.

Like maintaining the streets and sidewalks in Port Royal and Chiles reverted to proprietary functions, so the City of Lynchburg’s maintenance of its streets and sidewalks reverted to a proprietary function. The Town of Port Royal cleaned up after an emergency yet left the dangerous obstruction of a large snow pile on their sidewalk afterward, which injured Charlotte Smith four days after the town had finished cleaning up. In Chiles, Richmond similarly left dangerous snow and ice on its sidewalk for longer than needed for it to remove the obstructions. Likewise, the City of Lynchburg left another dangerous item, an eight-inch-circumference branch, lying against a city curb. (Stipulated Facts ¶ 2.) This branch likewise injured Lynn Smith five days after the city had otherwise cleaned up the area. (Stipulated Facts ¶ 3, 6.) In all three cases, a substantial amount of time had passed since the emergencies, but the municipalities did not finish cleaning their streets properly. Therefore, the maintenance of Lynchburg’s streets and sidewalks had reverted to a proprietary function, which is not covered by sovereign immunity.

1. **The City of Lynchburg did not require notice yet had both actual and constructive notice of the hazard**

To be liable for a defect in a street, a municipality usually requires notice of the defect in time to put the street in a reasonably safe condition. West, 196 Va. at 513. This notice can be either actual or constructive. Id. Actual notice must be given to an officer or servant of the city who has “supervision of its streets or with authority to direct work thereon.” Virginia Beach v. Roman, 201 Va. 879, 883–84 (1960). The city received actual notice when Dottie Davis, Administrative Assistant to the Director of Public Works, actually saw a branch fall where the accident happened five days afterward. (Davis Aff. ¶ 13, 14, 15; Compl. ¶ 4.) Constructive notice requires that the hazard to have “existed for such length of time that proper diligence would have discovered it.” West, 196 Va. at 514. However, if the hazard arose as “the direct act of the corporate authorities or its agents,” no notice is required to be given. Id. Because the branch that injured Ms. Smith was cut by city workers and remained there five days later, the City of Lynchburg did not require notice but still received constructive notice. (Stipulated Facts 6; Davis Aff. ¶ 13, 15; Compl. ¶ 4.)

* 1. The City of Lynchburg had actual notice

A city has actual notice of a hazard if it is known by an officer or servant of the city who has “supervision of its streets or with authority to direct work thereon.” Roman, 201 Va. at 883–84. In Roman, the plaintiff, Roman, was walking back to her hotel and stepped off a sidewalk onto a section of grass leading to her hotel. Id. at 880. However, in the grass, hidden behind a pipe, was a hole which Roman stepped into. Id. Her leg fell in up to her knee and broke as a result. Id.

The court held that the city was not liable because it was not shown that the city had notice of this defect. Id. at 882. It found that there was no evidence that the city had actual notice or constructive notice. Id. at 882, 884. The court stated that actual notice has to be given to a city’s “officers or servants having supervision of its streets or with authority to direct work thereon.” Id. at 883–84.

Unlike how no one notified a city officer or servant in Roman, Lynchburg’s Administrative Assistant to the Director of Public Works, Dottie Davis, actually saw a branch fall off a city truck in the area a week before Smith’s injury. (Davis Aff. ¶ 13, 15.) However, instead of reporting this hazard, Davis, in her folly, merely assumed that work crews would rectify it on their own and did nothing. (Davis Aff. ¶ 16.) Therefore, Dottie Davis, an agent of the city, had actual knowledge of the branch.

* 1. The City of Lynchburg created the defect so notice is not required, but Lynchburg still had constructive notice

A city has constructive notice of a hazard on its property if the hazard “existed for such length of time that proper diligence would have discovered it,” but it is not necessary if the hazard arose from “the direct act of the corporate authorities or its agents.” West, 196 Va. at 514. In West, the plaintiff West was walking home from the store, like she did several times a week, when she tripped on a defect in the sidewalk, although there was conflicting testimony as to what this defect was. Id. at 511, 515. Four days later, two city employees came and repaired that area of the sidewalk without any specific instruction to but not for the issue that West claimed injured her. Id. at 512.

The court held that the city was not liable for the defect because there was no evidence that the city was on notice of the defect. Id. at 515. There was no contention of faulty construction or actual notice, and constructive notice could not be supported. Id. The court said that constructive notice could have been achieved by showing that “the defect causing the injury had existed for such length of time that proper diligence would have discovered it” and that it is not necessary if the defect was “the direct act of the corporate authorities or its agents,” but neither had been shown. Id. (quoting 13 Michie's Jur., Municipal Corporations, § 105, p. 469.)

Unlike the defect in West, the branch that caused Smith’s injuries was witnessed by third-parties. There was conflicting testimony about what caused West’s fall and no testimony as to when this defect may have occurred. The branch that caused Smith’s injuries was admitted to have been cut by the City of Lynchburg. (Stipulated Facts 6.) The fact that it was still there to injure Ms. Smith on the evening of July 4 shows that her hazard arose from the “direct act” of the city’s work crew, removing the need to notify them.

Lynchburg’s Director of Public Works states that the workers were instructed to stack such branches in the grass strip in the street, yet a branch they cut was lying against the curb several days later. (Young Aff. ¶ 8; Compl. ¶ 4.) In fact, the director’s administrative assistant saw a branch fall off a city work truck at that location five days before Ms. Smith’s accident. (Davis Aff. ¶ 13, 14, 15; Compl. ¶ 4.) She also saw other work crews working on Jefferson Street. (Davis Aff. ¶ 16.) This implies that the branch was lying there five days after it fell unsecured from the city’s truck, while city workers were still working in the area to some extent. Unlike the city employees in West who noticed and repaired a minor sidewalk defect only four days after the earliest allegation of its existence, city employees working overtime did not notice an eight-inch-circumference branch lying in the street. (Stipulated Facts ¶ 2; Young Aff. ¶ 6.) This shows that proper diligence by the city workers would have discovered the hazard, giving them constructive notice.

The City of Lynchburg was engaged in a proprietary function at the time of Ms. Smith’s accident and therefore is not covered by sovereign immunity. The City did not require notice of the hazard because it was caused by a direct act by its agents. Nevertheless, the City did receive constructive notice by the length of time lapsed while city workers were cleaning the area.

1. **Lynn Smith Was Not Contributorily Negligent As A Matter Of Law; However, A Jury Should Make This Determination**

Contributory negligence should generally be determined by a jury, and a trial court “may not usurp the jury’s role as a trier of facts.” Stevens v. Summers, 207 Va. 320, 324 (1966). The only situation in which the issue becomes one for a court is when “reasonable minds could not differ about the conclusion to be reached,” such as where the dangerous condition was open and obvious and yet the plaintiff did not exercise reasonable care for his safety under the circumstances. Ravenwood Towers, 244 Va. at 57; Little Creek Inv. Corp. v. Hubbard, 249 Va. 258, 261 (1995). Ms. Smith had been looking ahead while she was walking down the street, yet did not see the branch. (Smith Dep. at 16.) However, when she reached the curb she slowed down and observed her surroundings, focusing on the approaching car. (Smith Dep. at 16.)

For a plaintiff to be contributorily negligent for failing to avoid a defect, the defect must either be known beforehand by the plaintiff or be “open and obvious,” so that it should have been seen “by the exercise of ordinary care.” Hillsville v. Nester, 215 Va. 4, 5 (1974). It was getting dark at the time of the accident, diminishing Ms. Smith’s ability to see the branch, which was approximately two-and-a-half-inches in diameter and laying up against the curb. (Stipulated Facts ¶ 2, 9; Smith Dep. at 19.) Since Smith was paying attention to her surroundings and because there is no evidence that Smith could have seen the branch by the curb even had she looked, the motion for summary judgment must be denied.

* + - 1. **Lynn Smith was not contributorily negligent**

For a plaintiff to be contributorily negligent for failing to avoid a defect, the defect must either be known beforehand by the plaintiff or be “open and obvious,” so that it should have been seen “by the exercise of ordinary care.” Nester, 215 Va. 4 at 5. In Nester, the plaintiff Nester tripped on a misaligned sidewalk block. Id. Nester took this route numerous times over the previous eight months and never noticed the misalignment. Id. at 5, 6. It was broad daylight at the time and Nester did not say that her vision was impaired or obscured. Id. at 4, 5.

The court held that Nester was contributorily negligent as a matter of law, believing her to be simply unobservant. Id. at 6. The court based this on the fact that “the defect was not minor or latent but substantial and readily discernible to the most casual view.” Id. at 5. The court stated that when an accident occurs in broad daylight as a result of such a defect, the plaintiff has the burden of showing “conditions outside of himself” which prevented him from seeing the defect or “would excuse his failure to observe it.” Id. at 6. The court clarified, “While a pedestrian is not required to keep his eyes fixed constantly upon the sidewalk ahead of him, he cannot walk heedlessly along in complacent faith that his path is free and clear of pitfalls and obstacles.” Id. The court reasoned that Nester had to be simply unobservant if she failed to notice the open and obvious defect after passing by it for eight months.

Unlike how the hazard was not obscured in Nester, the branch that Ms. Smith fell on was lying right up against a curb. (Smith Dep. at 19.) Given that the branch was only 2-and-a-half-inches in diameter, such a curb could obscure it. (Stipulated Facts ¶ 2; Photograph of Jefferson Street curbs.) It was also dusk when Smith fell, unlike the daytime in which Nester fell. (Stipulated Facts ¶ 9.) Smith had looked ahead while walking, and she slowed down and looked observantly when coming to the intersection as she saw the car. (Smith Dep. at 16.) This display of ordinary care is in contrast to Nester’s lack thereof, who missed a similar-sized defect despite walking the path for the last eight months. This was the only time that Smith had taken this route since the defect existed, and she was not a resident of Lynchburg. (Smith Dep. at 20; Compl. ¶ 1.)

* + - 1. **Contributory negligence is a jury issue**

Contributory negligence is an issue for the jury unless “reasonable minds could not differ about the conclusion,” such as when the dangerous condition was “open an obvious.” Ravenwood Towers, 244 Va. at 57. In Ravenwood Towers, the plaintiff Woodyard, an 88-year old woman with poor vision, attempted to use the elevator in her building, as she had done for many years without issue. Id. at 53. Unfortunately, the elevator did not align with the floor properly and was one foot too low, but Woodyard did not notice this until she fell into the elevator. Id. at 53–54. The floor of both the hall and elevator were dark, the area was dimly lighted, and Woodyard was in a hurry to enter the elevator. Id. at 59.

The court held that Woodyard was not contributorily negligence as a matter of law, noting that whether a condition is open and obvious could be an issue for the jury. Id. Since Woodyard had never seen this condition before, she had no reason to expect the misalignment. Id. at 58. The court stated that Woodyard entering the elevator in a hurry before the doors shut was acting “acting as an ordinarily prudent person.” Id. at 59. The court reasoned that reasonable minds could differ about whether or not she was contributorily negligent, so it was not an error to submit the issue to the jury. Id.

A pedestrian’s failure to look down does not have to constitute contributory negligence if he exercised reasonable care. Little Creek, 249 Va. at 261. In Little Creek, plaintiff Hubbard worked at a store in Little Creek East Shopping Center. Id. at 260. It was dark, rainy, and windy and Hubbard followed other employees towards the parking lot, only looking ahead and never down. Id. Hubbard then tripped over a muffler laying on the sidewalk and broke her hip. Id.

The court held that the issue of Hubbard’s contributory negligence was correctly submitted to the jury. Id. at 264. The court specifically declined to find that a pedestrian’s failure to look down constituted negligence as a matter of law in every case. Id. at 261. It instead stated that the circumstances must be considered to determine if a pedestrian otherwise exercised reasonable care for his safety under the circumstances. Id. The court reasoned that if evidence thereof is produced, then “a jury question is presented.” Id.

Like how Woodyard had no reason to expect a defect, Ms. Smith had no reason to expect a defect. Woodyard had taken the elevator for many years without an issue and did not expect a dangerous condition. Likewise, Ms. Smith was familiar with the area, having visited downtown Lynchburg's riverfront area two or three times previously, and therefore she did not expect any dangerous defects at the location. (Stipulated Facts ¶ 1.) Even though Smith was walking quickly, Smith had looked ahead at the intersection and seen nothing dangerous before reaching it and paid attention to the oncoming traffic that she was then confident she could cross before. (Smith Dep. at 16.) Similarly, Woodyard hurried into the elevator, which was not inconsistent with acting as an ordinarily prudent person. Unlike Smith looking ahead, Hubbard did not look at the path ahead of her at all and yet was found to not be contributorily negligent as a matter of law. Smith’s actions were not indicative of contributory negligence, and just as Woodyard’s and Hubbard’s alleged negligence was held to be an issue for the jury, so should Smith’s alleged contributory negligence be a jury issue.

1. **Conclusion**

Mrs. Smith should be granted her motion for partial summary judgment because the City of Lynchburg is not covered by sovereign immunity, had notice of the defect, and Ms. Smith was not contributorily negligent as a matter of law. Sovereign immunity only applies to governmental functions, which routine street maintenance is not. The City of Lynchburg received both actual and constructive notice of the defect. Plaintiff was not contributorily negligent, and such a matter should be a question for the jury. Accordingly, Plaintiff asks this Court to grant Plaintiff’s motion for partial summary judgment.

 LYNN SMITH

By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Of Counsel

 Matthew Miner

 Dewey, Cheatum, & Howe

 101 Swine Court

 Lynchburg, Virginia 24501

 (555) 123-4567

**Certificate of Service**

I hereby certify that on March 16, 2018, a copy of the foregoing Memorandum in Support of Plaintiff’s Motion for Partial Summary Judgment was emailed to counsel as follows:

Aaron Chastain, City Attorney

Nada, Zilch, Zippo, & Nyet

101 Defense Blvd.

Lynchburg, Virginia 24501

Date: \_\_\_\_\_\_\_\_\_\_\_\_ Matthew Miner