Court of Appeals of Nebraska.

Vanessa K. HOLTS, individually and as Special Administrator of the Estate of Alois Merlin Holts, deceased, Appellee,

v.

CITY OF OMAHA, Appellant.

No. A-01-298

Not Reported in N.W.2d, 2002 WL 31002306 (Neb.App.)

Aug. 6, 2002.

Appeal from the District Court for Douglas County: J. Patrick Mullen, Judge. Affirmed.

Thomas O. Mumgaard, Deputy Omaha City Attorney, and Jo A. Cavel for appellant.

Thomas M. White, of Welch, White & Wulff, and Jerry Alexander for appellee.

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

***1** The district court for Douglas County awarded Vanessa K. Holts $410,815.54 for the loss of her 13 year old son, Alois Merlin Holts. Alois was killed when a decayed tree located in an Omaha right-of-way fell on him as he played on the sidewalk near his home. The City of Omaha (City) appeals.

FACTUAL AND PROCEDURAL BACKGROUND

On April 25, 1996, Alois was riding a go-cart on the public sidewalk near his home in Omaha when a 60- to 85-year-old green ash tree (the green ash), standing in the Camden Avenue and 33d Street right-of-way, broke approximately 6 feet above the ground and fell on him. Alois suffered severe internal injuries and never regained consciousness after the accident. He died on May 1.

On April 22, 1997, Vanessa filed a tort claim with the City for Alois' injury and death. No action was taken, and Vanessa, as special administrator of Alois' estate, filed a wrongful death suit against the City in the district court for Douglas County. Vanessa sought recovery for the pecuniary losses occasioned by Alois' death and for the loss of Alois' care, comfort, and companionship.

The pretrial order stipulated that the City had control over the street right-of-way at 33d Street and Camden Avenue, where the green ash had stood. The disputed issues included (1) whether

the City was negligent in its inspection and maintenance of the green ash; (2) whether the City had actual or constructive notice of the danger the green ash created, if any; (3) whether the City's negligence was a direct and proximate cause of Alois' death and Vanessa's damages; and (4) the extent of any pecuniary loss under Neb.Rev.Stat. ß 30-810 (Reissue 1995) and the loss of Alois' companionship, society, and comfort.

At the trial, Vanessa presented evidence tending to show that the green ash which fell on Alois had been visibly distressed or weakened and had been previously marked for removal in accordance with the City's procedure for maintenance of trees located in its right-of-ways.

Paul Holts, Alois' uncle, testified that the green ash and three other trees standing next to it had been marked with yellow X's. The evidence was that it is standard city procedure to paint an "X" on "hazard trees" designated for removal. According to Paul, who lived on the street where Alois was killed, the X's had been there at least since March 1995. Paul testified, "[W]hen you come around that corner, you couldn't help but see all of the X's on the trees." Paul recollected seeing the X's on the trees as late as 1997, but they were fading at that time. Upon cross-examination, when presented with pictures of the trees on 33d Street and Camden Avenue, Paul conceded that the trees did not appear to have X's on them. He claimed, however, that the paint had faded.

Vanessa also presented the deposition testimony of Ruth Williams Franklin, who had previously lived at 3356 Camden Avenue. Franklin testified that in the late 1980's, a 50-foot limb from the same green ash tree fell into her yard. According to Franklin, the leaves on that branch were brown and there was no high wind or storm on the day the branch fell. Franklin testified that she called the City immediately to have the limb removed from her yard. Franklin said that at that time, the City examined the green ash and decided not to remove it, a decision she did not agree with because the fallen limb was hollow and because the green ash also appeared hollow at the point where the limb had broken away. Franklin testified that she called the City three or four times to request the green ash's removal, but the City refused. According to Franklin, smaller limbs from the green ash continued to fall and she kept those cleaned up until she left the Camden Avenue house in 1992. Franklin testified that after hearing a news report of Alois' death, she drove to 33d Street and Camden Avenue to view the green ash and saw obvious signs of decay.

***2** Steven Day, an arborist who served as Vanessa's expert witness, testified that the green ash which fell on Alois was a "hazard tree," a tree with a structural defect which could harm people or property. Day reviewed about 50 photographs of the green ash before visiting Omaha, and he viewed the green ash in Omaha the day before the trial. In looking at the green ash, Day found in it an "extensive amount of decay and activity of insects." According to Day, the center of the wood was "punky," which is "about as close to being dust as you can get." Day pointed out several visible defects which he claimed should have alerted the City that the green ash was dangerous.

According to Day, the green ash contained a "hollow" wound with a "ridge of lighter-colored tissue pretty much surrounding this hollow." Day testified the wound was "full of decay, it's hollow, and that's a red flag." In addition, a bulge around a branch tear-out indicated that the green ash had an internal defect. Day also testified that epicormic shoots had been growing on

the green ash for approximately 6 years, which shoots indicate decay, a large wound, or poor health when they grow on a main stem. Day also testified that the green ash had near its base a "squirrel hole or cavity opening." Day claimed that this hole and the branch tear-out "alone would tell a reasonable person that it is extremely likely, highly probable" that the decay from each wound would merge, creating a column of decay in the green ash. According to Day, all of these symptoms are accepted among arborists as signs of serious defects in a tree.

Day testified that the decay in the green ash had been growing for at least 20 years. In Day's opinion, "there were sufficient external indicators that would have and should have prompted further and thorough testing of [the green ash]; and if that had been done, [the green ash] would have been condemned." Day further testified, "[J]ust that huge branch that broke out is so extraordinary and dangerous, that alone should have prompted the removal of [the green ash]."

Day testified that a strength-loss test would have provided additional evidence of decay. According to Day, City inspectors could have performed a strength-loss test on the green ash by hitting it with a rubber mallet to detect "hollow" sounds or by drilling a small hole into the green ash to "feel the resistance on [the] drill bit." Day testified that both procedures are accepted by arborists and are routinely used by federal, state, and city agencies. Day also alluded to a test in which core samples would be bored from the wood, but conceded that this test is more invasive than the other two.

Day also testified, over the objection that it was "surprise" testimony, that he performed his own strength tests on the green ash with a formula that is accepted worldwide and found a 76-percent strength loss of the stem at the point where the green ash broke. Day testified that Philip Pierce, a retired city forester and the City's expert, calculated the strength loss at 35 percent, but those calculations included measurements for bark and for decayed and punky wood, which Day testified should be excluded from the mathematical formula used to determine strength. However, Day testified that although he believes Pierce calculated the green ash's strength incorrectly, even a 35- percent strength loss indicates that the green ash should have been removed. According to Day, "the overwhelming majority of trees will fail because of structural unsoundness once the stem has lost approximately 33 percent of its strength." This threshold, according to Day, is accepted throughout the world as an accurate standard.

***3** Finally, Day testified that in areas with very strong winds, weak-wooded trees are more likely to break and strength-loss thresholds should be decreased. Day testified that arborists must take into account typical winds in the area when judging which trees to remove.

On cross-examination, Day testified that he viewed only pictures and documents relating to the green ash until almost 5 years after it fell and that he had not touched the green ash until the day before trial. However, Day testified that because the green ash had been stored in a dry environment since the accident, any decay occurring since the green ash fell would be "insignificant."

Day also testified on cross-examination that an annual driveby inspection, like the inspections which the City performs, is not an accepted reasonable inspection method for identifying urban hazard trees. The cross-examining attorney produced Day's July 25, 2000, deposition, in which

Day stated that for most trees, the driveby inspection is reasonable "as long as the drive-by isn't done by an 18-year-old going 45 miles an hour." However, Day indicated that the deposition testimony referenced nonhazardous trees, not hazardous ones.

Day also conceded that trees can compartmentalize decay, walling off areas of decay to prevent them from spreading through the tree. He indicated that bulges signal the tree's unsuccessful attempts to compartmentalize decay. He also agreed, consistent with his testimony on direct examination, that epicormic sprouts do not always indicate decay; they could "be either a wound or it could be in response to die-back of the branch further up the tree."

Finally, Vanessa presented deposition testimony from Pierce. In that deposition, Pierce testified he believed Franklin's testimony that she contacted the City about the green ash, although there were no records documenting those calls. Pierce claimed in his deposition, however, that he could find no records showing that the green ash had been inspected or marked for removal in the 2 years prior to Alois' death, probably because the inspectors did not write up such records on the green ash. Pierce also stated that the "squirrel-sized hole" and the injury where the green ash grew over the curb were "about all that would have been readily evident" on a driveby inspection and that on closer inspection, "there were two branch breaks that had some decay." However, Pierce noted that the visible signs of decay were not sufficient to prompt an inspector to leave the car for closer inspection during a driveby. Pierce also claimed that the strength-loss tests he performed on the green ash after it fell "didn't pass the 33 percent threshold in which we would have condemned the [green ash] on the cavity, on the decay." Pierce admitted that it is uniform practice to exclude bark and punky wood from the strength-loss calculations, but he included some punky wood and all of the bark in his measurements. Pierce testified, however, that he used the generally accepted International Society of Arborists calculation, which takes into account the full circumference of the tree in calculating strength loss.

***4** Pierce also said that hazard trees were marked for removal with a yellow X until 1995, when the City started rotating colors. He testified that there was no sign of paint on the green ash.

The City stipulated that it has the legal responsibility to take reasonable care to identify the road hazards presented by street trees, despite a city ordinance requiring adjoining property owners to maintain the trees. According to Pierce's trial testimony, the ordinance required residents to prune, fertilize, and water the trees, as well as do "anything that was needed to either keep the tree in good health or make it so that the public thoroughfare stayed clear" from overgrown branches. However, Pierce agreed that the City had a legal obligation to inspect the green ash that fell on Alois and that the City was responsible for removal of hazard trees.

According to Pierce, once city inspectors determined that a tree was a hazard, they were required to mark an X on the tree with paint and write a report on the tree. Before the tree's removal, the inspector returned to see that the tree had been properly marked and that the notes on the tree were accurate. The inspector would then paint a second X on the tree to confirm that the tree had been rechecked and was ready for removal. Pierce testified that all marked trees were removed within 6 to 18 months and that the two or three trees that might be missed each year were removed the following year. According to Pierce, "there was nothing ... that led [him] to believe that [the green ash] had ever been X'd with yellow paint." He claimed, however, that

the yellow paint used to mark trees would "weather off in two to three years."

Additionally, Pierce testified that he believed winds had reached 50 miles per hour on the day the green ash fell and that those winds were a "contributing factor" to the tree's breaking. However, Pierce testified that 50-mile-per-hour winds are not "extraordinary" or "unforeseeable" in Omaha. Pierce stated, "We understand that 50 mile-an-hour winds do occur in this area."

Some of the City's interrogatory answers read into evidence show that the City, at the time it answered the interrogatories, was "unable to determine if trees were 'ever' identified for removal. Trees were identified for removal in the several block area surrounding 33rd & Camden Streets after the 1994 and 1995 annual inspections, but [the City] believes none were identified within 100 yards" of the green ash. Pierce also testified that there was no information indicating that the green ash had been marked for removal. The interrogatory answers further revealed that the City had not performed tests of any kind on the green ash or any other trees within 100 yards of it prior to the time the green ash fell.

Bob Thiesen, a certified first class arborist and city inspector responsible for inspecting trees in the Camden Avenue and 33d Street area in 1994, testified that he had no recollection of ever placing or seeing an X on the green ash or any other trees in that area. On cross-examination, Thiesen testified that during his inspections of the green ash, he did not notice any prior branch tear-outs, the epicormic sprouts, or the cavity at the curb line. He also acknowledged that he did not see that 20 percent of the green ash's canopy was gone due to the 50-foot branch tear-out. Thiesen testified that having no records of the tear-out, he had no reason to stop during his driveby inspection and examine the green ash more closely. On redirect, Thiesen clarified his testimony, saying that he had no recollection of whether he saw the visible signs of decay during his drivebys.

***5** Mark Evanoff, environmental inspector for Omaha, testified that he conducted a survey of trees along 33d Street north of Camden Avenue on December 20, 1995. He testified that he does not recall seeing any trees marked with an X in that area and that he must not have seen any evidence of decay on the green ash. On cross-examination, Evanoff indicated that the "cavity" at the curb line of the green ash was not really a cavity, but an indicator that the green ash was "trying to find room to grow." In addition, he did not agree that when a tree loses 20 percent or more of its canopy, it is a hazardous tree. According to Evanoff, the loss of a limb by itself would not indicate that the tree should be removed.

Finally, Terry A. Tattar, a professor of microbiology at the University of Massachusetts in Amherst, Massachusetts, testified that after the green ash fell, he examined its stump as well as the other trees growing around the green ash. According to Tattar, there was no indication that yellow paint had been applied to any of the trees and there were no external indications of defects on the trees. Tattar stated that he examined the fallen green ash and determined that prior to April 25, 1996, the green ash did not have visible indications that it was a hazard tree. According to Tattar, "the defects ... were of a relatively minor significance or in locations where they would not have been noticed by the inspector." Tattar testified that the tear-out wound on the green ash would not have indicated decay, because trees have an ability to "compartmentalize," or wall off, decay from a wound to prevent the decay from spreading.

According to Tattar, the wood between the tear-out and the breaking point on the green ash was "completely sound." The "squirrel hole" near the base, according to Tattar, "would have been considered a minor wound on a tree that was showing active signs of closing and would not--certainly would not have condemned the tree." Tattar further testified that "the [green ash] was not hollow," despite his admission that photographs of the green ash show it was at least partially hollow where it broke. The curb-line growth, according to Tattar, was a "common occurrence" that does not necessarily create cavities or decay. Tattar explained that epicormic sprouts on a tree do not indicate decay. Instead, they indicate a "change in exposure to light" and that "the tree is growing--putting on new growth every year." According to Tattar, the green ash "would have leafed out normally within a few weeks if the failure hadn't occurred." Further, Tattar claimed that the green ash's growth rings did not indicate that it had been declining in its rate of growth. Tattar stated that the color of the green ash would not indicate decay and that calculations attempting to determine how long decay has been present and growing are usually inaccurate.

Tattar testified that boring or drilling into a tree to test for strength is too invasive, because wounding the tree in that manner would exacerbate the tree's condition. According to Tattar, "[t]his is not part of a normal protocol of inspection of municipal trees." Tattar also testified that he does not recommend "sounding," hitting the tree with a mallet to detect "hollow" sounds, because "it is very subject to error because the sounds are very hard to perceive." Further, Tattar claimed that strength-loss calculations are "variable" and "fraught with error."

***6** Finally, Tattar testified that the use of a driveby inspection is an acceptable method of inspecting for hazardous street trees and is the most common type of inspection used by large cities. Tattar stated, "The City of Omaha's program is certainly in my opinion one of the best if not the best because of its long history of developing and training inspectors and keeping track of the trees on an annual basis."

After Tattar left the stand, Vanessa called three "rebuttal witnesses." Their testimony suggested that the green ash had been marked for removal.

TRIAL COURT'S DECISION

The district court found that the City has a duty to remove hazardous trees from its right-of-ways and that "the manner in which the City inspects for hazardous trees is problematic." The court found that "the [green ash] had been designated by an X for removal years prior to the time it fell and killed [Alois]," but that even if the green ash had not been marked with an X, the evidence showed that it "still should have been removed prior to the time it fell and killed [Alois]." The court held that the City had reasonable notice that the green ash was hazardous and needed to be inspected and removed. The court stated, "Through the exercise of reasonable care the City should have known the danger the [green ash] created." The court found that the City was negligent in failing to remove the green ash and that this negligence was the proximate cause of Alois' death.

The court awarded Vanessa $56,726.98 for medical expenses, $4,088 .56 for funeral expenses, and $350,000 for the loss of Alois' society, comfort, and companionship.

ASSIGNMENTS OF ERROR

The City claims that the district court erred (1) in allowing testimony from previously undisclosed witnesses saying that the green ash was marked for removal prior to its failure, (2) in allowing opinion testimony based on undue speculation, (3) in concluding that the City had actual and constructive reasonable notice of the green ash's hazardous nature, (4) in finding the City negligent in its manner of inspection and in concluding that the only reasonable inspection would involve drilling and boring into the green ash, and (5) in concluding the City was negligent in failing to timely remove the green ash.

STANDARD OF REVIEW

In a bench trial of an action at law, the factual findings made by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Brandon v. County of Richardson,* 261 Neb. 636, 624 N.W.2d 604 (2001).

ANALYSIS

Surprise Witnesses.

The City first argues that the district court erred in finding that the City had reasonable notice that the green ash was hazardous. The City claims that the trial court based its conclusions on improperly admitted evidence and faulty conclusions. Specifically, the City claims that "the court accepted incredible and contradictory surprise testimony and stated as a fact that 'the [green ash] had been designated by an X for removal years prior to the time it fell and killed [Alois].' " Brief for appellant at 16.

***7** According to the City, the testimony of Vanessa's three "rebuttal witnesses" was improperly admitted because these witnesses were not identified prior to trial. The City therefore argues that the testimony violated the pretrial order, which required disclosure of "all witnesses whom [Vanessa] expects to call to testify except those who may be called for impeachment purposes only." Brief for appellant at 17. The City argues that "the evidence offered here by the three surprise witnesses was not 'impeachment,' " but instead served as substantive evidence which "contradicted" the City's evidence. Brief for appellant at 19.

We need not determine what purpose the so-called "surprise" witnesses' testimony served or whether the court erroneously admitted the testimony. The erroneous admission of evidence in a bench trial is not reversible error if other relevant evidence, properly admitted, sustains the trial court's necessary factual findings; in such case, reversal is warranted only if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. *Bowers v. Dougherty,* 260 Neb. 74, 615 N.W.2d 449 (2000). *Bowers* makes it clear that the question is whether the trial court's factual determination was based solely on erroneously admitted evidence.

The contested testimony from the three "rebuttal witnesses" relates to whether the green ash had been marked for removal before it fell. But Paul also testified that the green ash had been marked with a yellow X before it fell, and his testimony was not objected to and stands properly admitted. The City argues on appeal that Paul's testimony "could have been given no weight" because "it is utterly lacking in credibility and is conflicting." That may be correct, and it may not be how the trial court viewed Paul's testimony, but it is well established that in a bench trial

of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. See *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996). This court will not reweigh the testimony or reevaluate the credibility of the witnesses, but it will review the evidence to determine whether the trial court made findings which are clearly wrong. *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998). Thus, even ignoring the testimony of the so-called "surprise" witnesses, the record contains sufficient other evidence to support the district court's finding that the green ash had been marked with an X with yellow paint. Thus, no reversal can be premised on the rebuttal evidence. Nor do we need to decide whether it was properly admitted. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court need not address issue not necessary to decision).

Further, the district court clarified in its order that even if it took the position that the green ash had not been marked for removal, it would still find, based on other evidence, that the green ash should have been removed. For this additional reason, we reject the City's first assignment of error.

Notice and Negligence.

***8** The City next argues that the court erred in finding that Franklin's complaints gave the City reasonable notice of the green ash's hazardous condition. According to the City, "[Franklin's] contact was too remote in time, there was no evidence that any external indicators of decay were present at that time, and there is no evidence regarding the extent of any decay or other defect present at that time." Brief for appellant at 29.

We disagree. Tattar, a witness for the City, testified that the tear-out wound on the green ash would not have indicated decay and that the wood between the tear-out and the breaking point on the green ash was "completely sound." However, Franklin testified through deposition that the green ash looked "hollow" where the tear-out occurred, and Day testified that the tear-out alone provided sufficient notice that the green ash was a hazard, stating, "just that huge branch that broke out is so extraordinary and dangerous, that alone should have prompted the removal of [the green ash]."

The court specifically found that "Tater [sic] was impeached by evidence he gave while under oath in a trial with similar issues in the State of Ohio.... The opinions of Terry Tater [sic] are given less weight than the opinions of Steven Day." Again, we reiterate that we do not reweigh evidence or judge witnesses' credibility. After reviewing the evidence, we find that the district court was not clearly erroneous in finding that based on Day's and Franklin's testimony, the City had actual notice of the green ash's structural defects.

The City next argues that "the trial court also looked to the testimony of Steven Day to support the court's conclusion that the City should have known 6 to 8 years earlier that the [green ash] should come down. But, that testimony was riddled with the speculation and conjecture one would expect in discussing the progression of decay over extended periods of time." Brief for appellant at 32-33.

The City argues that Nebraska law prohibits experts from giving opinions based on mere "guess or conjecture," but Day based his testimony on inspection methods, measurements, and calculations generally accepted among arborists and foresters. In determining that the City had constructive notice of the green ash's hazardous condition, the court recited Day's evidence that "external indicators of whether a tree is defective and hazardous are cuts, cavities, branch loss, epicormic sprouts, and bulges." In addition, the court noted the "round hole close to the bottom of the tree ... the roots overlapping the curb [and] the branch tear-outs"--all "indicators of a defective tree." The court also pointed to Day's strength-loss calculations, which were based on a formula which Tattar challenged as "unreliable," but which Pierce acknowledged was generally accepted by foresters. According to the court, "the testimony of Steven Day is logical when taken together with the physical evidence including the photographs showing the extensive decay within the stump of the [green ash]."

***9** Day has vast experience in diagnosing tree defects, has published close to 25 articles on the subject, and has taught over 100 seminars related to tree care, with 25 percent of those dealing specifically with the nature and evaluation of hazardous trees. Day personally evaluated approximately 44,000 street trees in the city of Boulder, Colorado, and he subsequently developed guidelines for Boulder's forestry department personnel to use in evaluating hazardous trees. It is a stretch to call Day's testimony "guess" or "conjecture," even as it regards "dating" the decay. The district court was not clearly wrong in using Day's testimony as a basis for its decision or in finding that Day was more credible than Tattar.

The City also relies on ***McGinn v. City of Omaha*, 217 Neb. 579, 586, 352 N.W.2d 545, 549 (1984)**, another case involving a fallen tree, which focused primarily on "**the question as to whether the city, through the exercise of reasonable diligence, should have known of the defective condition of the tree."** According to the City, ***McGinn*** held that the plaintiff may not recover without proving "**that the city failed to inspect the tree and that the city failed to observe visible signs of substantial decay and that the city failed to conduct a reasonable investigation prompted by the presence of indications of decay which would have revealed the extent of the decay."** Brief for appellant at 31-32, quoting ***McGinn, supra***. While we do not read this language to establish an inflexible formula under which all "fallen tree" cases should be decided, we think that the instant case was tried with this standard in mind. There was ample evidence of the City's failure to discover signs that this was a hazard tree that should have been removed. Moreover, according to ***McGinn,*** **"Negligence must be measured against the particular set of facts and circumstances present in each case." 217 Neb. at 585, 352 N.W.2d at 549**.

The City also argues that because ***McGinn, supra,*** favorably reviewed Omaha's driveby inspection plan, the district court erred in "basing its conclusions of negligence on a finding critical of the windshield tree inspection method utilized by the City." Brief for appellant at 39. Tattar testified that the driveby inspection is acceptable for identifying hazardous street trees. Day testified that such inspection is an acceptable method for viewing *nonhazardous* street trees, but only if inspectors make a more detailed investigation upon finding symptoms of decay. Day's testimony supports the City's practice in theory--the drivebys help inspectors determine whether a specific tree requires closer examination. But some testimony in this case indicates that the green ash did not receive such close examination despite several visible indicators of decay.

Additionally, evidence showed that the green ash had in fact been marked for removal as a hazard tree, but it was not removed. Either factual scenario would support the verdict.

***10** We need not discuss whether the district court erred in finding Omaha's inspection system "problematic." The green ash, viewing the evidence most favorably to Vanessa, had several visible external indicators of decay which, under the driveby inspection method, should have prompted a closer inspection. If the City had properly inspected the green ash under the City's own inspection system, it would surely have identified the green ash as a hazard. The court did not clearly err in finding that the City "should have known the danger the [green ash] created." And, based on substantial evidence of the green ash's decay and evidence it had been marked for removal, we cannot say that the court clearly erred in finding that the City was negligent in failing to timely remove the green ash.

CONCLUSION

As Vanessa notes in her brief, with the exception of errors assigned to purported erroneous admissions of evidence, the City seeks simply to attack the trial court's factual determinations. In essence, the City requests in various different ways that we reweigh the evidence and judge the witnesses' credibility. Well-settled law cited herein prevents us from doing so. There is ample evidence that Alois was killed by a falling tree which the City knew, or should have known, was a hazard tree threatening the lives and safety of Omaha citizens. The City failed to act reasonably upon its knowledge or upon what it could readily have learned. Accordingly, we affirm the verdict against the City.

AFFIRMED.