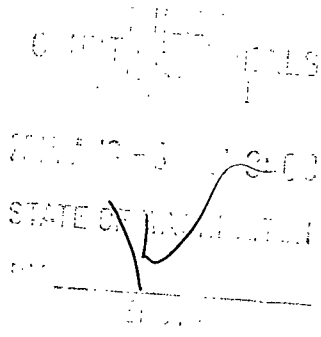

No. 45504-8

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BESSIE WILLIAMS,
Appellant

v.

JOHN DOE; FIRST TRANSIT, INC.; CITY OF TACOMA; and
CENTRAL BIBLE EVANGELICAL CHURCH,
Respondents

BRIEF OF RESPONDENT CENTRAL BIBLE EVANGELICAL CHURCH

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ORIGINAL

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I. INTRODUCTION

This case arises out of Williams' complaint for negligence against Central Bible Evangelical Church ("Central Bible") after she suffered personal injuries on a sidewalk abutting land Central Bible owned. In response to Central Bible's summary judgment motion, Williams submitted an untimely brief signed by a Michigan attorney who had been admitted to limited practice in Washington but whose associated local counsel had withdrawn months before she submitted the response. The trial court treated Central Bible's summary judgment motion as unopposed and granted the motion. Williams now appeals that decision.

Because the trial court's decision to strike Williams' untimely response was within its sound discretion and because the trial court could not accept the response under the court rules because it was submitted by an attorney not licensed in Washington, the trial court properly treated Central Bible's summary judgment as unopposed and dismissed Williams' claims. Moreover, even if this court were to reach the merits of Williams' negligence action, Central Bible owed no duty to Williams as a matter of law and, moreover, Williams' deficient factual support for her action is fatal to her negligence claim. Accordingly, Central Bible respectfully requests that this court affirm the trial court's summary judgment order.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

There are two overarching issues on appeal that Williams does not highlight in her opening brief. Accordingly, Central Bible submits this counterstatement of the issues to clarify the issues as they pertain to the trial court's decisions being appealed in this matter:

1. Did the trial court properly treat Central Bible's summary judgment motion as unopposed where (a) the trial court's decision to strike Williams' response as untimely was within its sound discretion and (b) withdrawal of local associated counsel voided Williams' attorney's limited admission to practice in Washington as a matter of law?

2. Even if the trial court had considered the untimely and improper responsive materials, would Williams' negligence claim nevertheless have failed on the merits had those materials been considered where Central Bible did not make special use of the sidewalk, did not place an artificial condition on the property, and the condition was open and obvious?

III. COUNTERSTATEMENT OF THE CASE

A. Williams' Complaint

Williams filed a complaint for negligence against Central Bible for personal injuries she suffered after falling from her wheelchair onto a sidewalk adjacent to property owned by the church. Clerk's Papers (CP) at

1-4. Williams alleged that in 2008, an employee of First Transit drove her on a shuttle bus to property owned by Central Bible in Tacoma and that the employee assisted her in reaching the building on the property by pushing her in her wheelchair. CP at 2. Williams claimed that as the employee pushed her along the sidewalk, he began to run despite her requests that he stop. CP at 2. She alleged that as he pushed her, one of the wheels of her wheelchair hit a raised crack in the sidewalk, stopping the wheelchair abruptly and causing her to be thrust from the wheelchair, causing severe personal injuries. CP at 2. Williams claimed that Central Bible negligently failed to maintain the sidewalk in a safe condition. CP at 3.

B. Williams' Representation

On October 24, 2011, Plaintiff initiated this lawsuit on her own accord as a pro se plaintiff. CP at 1-4. On May 25, 2012, an attorney licensed in Washington, David Britton, moved for limited "pro hac vice" admission on behalf of Katrina Coleman, an attorney licensed in Michigan, under Admission to Practice Rule (APR) 8(b). CP at 53-58. The trial court granted the motion. CP at 56. Britton and Coleman then filed a joint notice of appearance on Williams' behalf. On June 18, 2013, after the Court awarded discovery sanctions against Plaintiff, CP at 475-76, Britton withdrew. CP at 377-78.

On August 21, 2013, Michael Ewetuga filed a notice of appearance on Williams' behalf. CP at 560-61. However, no motion for pro hac vice/APR 8(b) admission was filed to re-admit Coleman, Williams' Michigan counsel. Ewetuga subsequently withdrew from representation on October 8, 2013.

C. Central Bible's Summary Judgment Motion

On August 2, 2013, Central Bible moved for summary judgment, arguing that (1) it owed no duty to Williams as an adjacent property owner, (2) Williams failed to present any evidence of negligence because she could not identify the alleged crack in the sidewalk or where the accident occurred, and (3) Central Bible was not negligent as a matter of law because the crack was an open and obvious danger of which Central Bible had no prior knowledge. CP at 491-94.

The hearing on Central Bible's summary judgment motion was set for August 30, 2013. CP at 488. Williams failed to file an opposition to the motion by that date and, when Central Bible appeared to argue the unopposed motion, Ewetuga, Williams' Washington attorney who had filed a notice of appearance the previous week, orally moved for a continuance to give him time to review Williams' file. Report of Proceedings (RP) at 3-4; CP at 602. Central Bible opposed the motion, noting that the case already had been delayed significantly at multiple intervals. RP at 4-5. The trial

court granted the continuance and gave Williams' new counsel three additional weeks to prepare, noting the new hearing date for September 20. RP at 8-9. The trial court ordered that Williams' response to the summary judgment motion was due by September 9, consistent with Civil Rule (CR) 56(c)'s requirement that materials in opposition to summary judgment motions be submitted no later than 11 days before the hearing. RP at 8-9. In the alternative, he was to notify the parties in writing that he did not intend to oppose the pending motions for summary judgment. RP at 9.

Central Bible did not receive a response to its summary judgment motion by September 9 or notice that its motion would be unopposed, and therefore asked the trial court to grant its unopposed motion and to award fees for having to appear on August 30. CP at 627-28. On September 11, Central Bible received an untimely response to its motion and four supporting declarations. CP at 612-14, 617, 620, 623, 628. However, the response was not submitted by Ewetuga, Williams' new local counsel, but rather by Coleman, Williams' formerly-admitted pro hac vice counsel in Michigan. CP at 614. Central Bible asked that the trial court refuse to consider the untimely opposition brief and corresponding declarations and additionally urged the trial court to reject the brief because it was signed by Coleman, who was no longer authorized to participate in the case because

Britton, the attorney with whom she had associated under APR 8(b), withdrew months before. RP at 13-14; CP at 628.

The trial court acknowledged the untimeliness of Williams' opposition and noted that it failed to comply with the court rules. RP at 17. The court further concluded that Britton's withdrawal from the case "canceled" Coleman's admission to practice in Washington. RP at 17. The trial court reasoned that Britton

> had sponsored the pro hac vice application, which the Court granted because of his assurances to the Court the compliance with the rules, the Washington State Bar Association and the required Rules of Professional Conduct, in essence, an unlicensed lawyer in Washington. ... So with that, her materials were not applicable to the case because the Court can't consider them.

RP at 17. Because the trial court was left "in a position with basically unopposed Summary Judgment motions," it granted Central Bible's motion. RP at 18.[1] The trial court also granted Central Bible's request for attorney fees. RP at 18. On October 21, 2013, Williams filed a pro se notice of appeal with this court.

[1] Williams also unsuccessfully moved for reconsideration, but the trial court's order on reconsideration is not listed in Williams' notice of appeal. CP at 697.

IV. ARGUMENT

A. The Trial Court Properly Rejected Williams' Response to Central Bible's Summary Judgment Motion

The trial court's decision to strike Williams' response to Central Bible's summary judgment motion was twofold. First, the trial court determined that the brief was untimely and that Williams had failed to comply with the court rules in submitting it. RP at 17. Second, the trial court concluded that Britton's withdrawal from representation voided Coleman's authority to represent Williams in Washington and, therefore, the response brief submitted by Williams was unauthorized by the court rules. Each ground for the trial court's decision is addressed in turn.

1. The Trial Court Did Not Abuse its Discretion in Striking Williams' Untimely Opposition

a. Standard of review

This court reviews the trial court's decision of whether to accept a late-filed response to a summary judgment motion for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 499, 183 P.3d 283 (2008). A trial court abuses its discretion if its decision is manifestly unreasonable, is based on untenable grounds, or was made for untenable reasons. *In re Marriage of Chandola*, -- Wash.2d --, 327 P.3d 644, 650 (2014).

b. Williams failed on two occasions to timely submit a response to Central Bible's summary judgment motion

CR 56(c) requires that a party opposing a summary judgment motion file a response no later than 11 days before the motion hearing. If the party opposing a summary judgment motion submits an affidavit stating that she is unable to present facts essential to her opposition, then the court may "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." CR 56(f). A party may also move for an enlargement of time under CR 6(b) before the expiration of a deadline to permit a late filing or after its expiration to excuse an untimely filing "where the failure to act was the result of excusable neglect."

Here, Williams on two occasions failed to comply with the deadline in CR 56(c). Williams failed to submit a timely response to Central Bible's summary judgment motion by the original hearing date, August 30, 2013. CP at 602-03. Nevertheless, because of Ewetuga's recent appearance on the matter, the trial court continued the hearing date to September 20 and required any opposition to the motion to be submitted by September 9, consistent with CR 56(c). RP at 8-9. The September 9 deadline passed without any submission of documents from Williams. CP at 603. Although Coleman, Williams' former counsel in Michigan,

ultimately submitted a response on September 11, the trial court granted Central Bible's summary judgment motion because of Williams' untimely failure to oppose it. RP at 17; CP at 628.

The trial court's decision to reject Williams' late-filed response was squarely within its discretion and should be affirmed. After Williams failed to meet the first deadline, the trial court granted a continuance because of Ewetuga's recent appearance on the matter. However, after Williams' *second* failure to comply with CR 56(c)'s timing requirements, the trial court properly exercised its discretion to reject her late submission. Williams had ample opportunity before both deadlines to submit a motion under CR 56(f) for a continuance to obtain additional evidence or under CR 6(b) to enlarge time, but failed to do either.

At the September 20 summary judgment motion hearing, Ewetuga presented the trial court with a declaration from Coleman stating the reasons for her unavailability on the hearing date.[2] RP at 15-16. Williams argues that "[t]he court erred in not granting a short continuance pursuant to CR 56(f) and CR 6(b)" in order to allow Coleman to be present at the September 20 hearing. Br. of Appellant at 7. However, Williams fails to show how Coleman's presence to argue the motion would have affected either ground upon which the trial court decided to treat the motion as

[2] The trial court acknowledged that it received Coleman's declaration stating that she was unable to appear, but the declaration is not in the record. RP at 16.

unopposed. *See also* RP at 16 (trial court notes that the declaration "doesn't address the real issue"). First, Williams missed two deadlines imposed by the court rules and trial court for submitting responsive documents. Coleman's inability to appear for the motion in no way excuses her failure to timely provide responsive documents. Second, as will be discussed below, her presence on the matter in the first place was grounds for the trial court's rejection of the documents she ultimately did submit. Accordingly, this court should reject Williams' challenge to the trial court's denial of her former counsel's request to appear in what would have amounted to a third summary judgment hearing date after the same counsel had twice failed to timely file responsive documents. Given Williams' complete failure to comply with CR 56(c)'s timing requirements and failure to take measures prescribed by the court rules for extending the deadlines set forth in that rule, the trial court did not abuse its discretion when it decided to strike Williams' response and to treat Central Bible's summary judgment motion as unopposed.

2. The Trial Court Did Not Err in Striking Williams' Response Because it Was Submitted by an Attorney Unauthorized to Practice in Washington State

a. Standard of review and APR 8(b)

In addition to the trial court's proper exercise of discretion in striking Williams' response, the trial court was *required* to do so under

clearly established law prohibiting unauthorized practice of law in Washington State. APR 8(b) provides:

> A member in good standing of, and permitted to practice law in, the Bar of any other state ... may appear as a lawyer in any action or proceeding *only* (i) with the permission of the court or tribunal in which the action or proceeding is pending, *and* (ii) in association with an active member of the Washington State Bar Association, who shall be the lawyer of record therein, responsible for the conduct thereof, and present at proceedings unless excused by the court or tribunal.

(Emphasis added.). The attorney seeking admission must make a written motion to the court before which the action is pending, certifying compliance with the rule's requirements. APR 8(b)(1). The associated lawyer must join in the motion and certification. APR 8(b)(1).

After the application is made, whether to grant the application for admission is within the trial court's discretion. *Hahn v. Boeing Co.*, 95 Wash.2d 28, 33, 621 P.2d 1263 (1980). The instant case requires interpretation of the plain language of APR 8(b) to determine whether withdrawal of associated counsel voids foreign counsel's limited admission, a question of law this court reviews de novo. See *Biomed Comm, Inc. v. Dep't of Health Bd. of Pharmacy*, 146 Wn.App. 929, 934, 193 P.3d 1093 (2008) (interpretation of court rules reviewed de novo).

b. Pro hac vice counsel's authority to appear became void under APR 8(b) upon withdrawal of local counsel

The trial court considered Central Bible's summary judgment motion to be unopposed, in part, because the opposition was submitted by Coleman, a Michigan attorney who had been admitted to limited practice in Washington but whose sponsoring attorney, Britton, had withdrawn from the case. RP at 17-18. Accordingly, the trial court granted the motion. RP at 18. Because the plain language of APR 8(b) clearly requires a Washington attorney's participation in a case for which foreign counsel is admitted pro hac vice, this court should affirm the trial court's dismissal of Williams' suit.

Coleman successfully applied for limited admission under APR 8(b) with Britton as associated Washington counsel. CP at 53-58. The attorneys then filed a joint notice of appearance, but Britton subsequently withdrew from the case. CP at 377-78. Williams ultimately retained Ewetuga as Washington counsel, but Coleman never moved for limited admission with Ewetuga as associated local counsel. CP at 560. Ewetuga was involved with the case less than two months before he withdrew.

Under the plain language of APR 8(b), in order for Coleman to validly be admitted to practice in Washington State as Williams' counsel in this matter, she was required to be associated with an active member of the

Washington Bar. Under the rule, the associated Washington counsel in the matter will be "the lawyer of record therein, responsible for the conduct thereof, and present at proceedings unless excused by the court or tribunal." APR 8(b). When Britton withdrew, Coleman was no longer associated with an attorney who was a lawyer of record in the case. And because Britton was no longer the attorney of record, he could not be responsible for the conduct of proceedings and certainly would not be present at those proceedings. Therefore, under clearly settled law, Coleman's pro hac vice admission was no longer valid under APR 8(b) at the time she filed Williams' opposition to summary judgment, and, therefore, that submission was in contravention of the Washington court rules. Accordingly, the trial court did not err when it determined that Britton's withdrawal voided Coleman's admission to practice under APR 8(b) and, therefore, the trial court did not err when it treated Central Bible's summary judgment motion as unopposed.

Additional sources highlighting the local counsel association rule's purpose further confirm this result. The purpose of the local counsel association requirement is to provide a "reasonable assurance that local rules of practice and procedure will be followed." *Hahn*, 95 Wash.2d at 34. Here, Coleman repeatedly failed to comply with the local rules. After Central Bible's repeated attempts to obtain answers to its interrogatories and requests

for production from Coleman, Central Bible was required to file a motion to compel. CP at 242-45. On the evening before the motion to compel was set to be heard, Coleman emailed the responses to Central Bible. CP at 397. To avoid wasting the court's resources, Central Bible agreed to strike the pending motion. CP at 398. However, because the responses were inadequate, Central Bible asked Coleman to properly respond to and to supplement the requests. CP at 398. After Coleman failed to participate in a discovery conference and failed to properly respond, Central Bible filed another motion to compel. CP at 398.

Moreover, Coleman repeatedly failed to timely submit a response to Central Bible's summary judgment motion and ultimately submitted the response two days after the already-extended filing deadline. CP at 602-03, 628. Further, the trial court noted that when Coleman ultimately did submit responsive documents, she failed to comply with the local rules because she failed to provide the trial court with working copies. RP at 17. Coleman's unresponsiveness and complete failure to comply with the court rules highlights the importance of local counsel and is the type of conduct the local association rule was intended to prevent. *See Hahn*, 95 Wash.2d at 34.

In addition, APR 8(b)(3) provides that "No member of the Bar Association shall lend his or her name for the purpose of, or in any way assist in, avoiding the effect of this rule." To allow foreign counsel limited

admission to practice in Washington by associating with local counsel and to allow foreign counsel's continued admission notwithstanding local counsel's immediate withdrawal clearly would amount to local counsel's assistance in avoiding the rule's purpose and would defeat the purpose of local counsel's important supervisory role.

The trial court clearly acted within its discretion in striking Williams' untimely opposition to the summary judgment motion. Moreover, under APR 8(b), the trial court was required to strike the materials as they were submitted by counsel unauthorized to practice in Washington. Accordingly, this court should affirm the trial court's decision to treat Central Bible's summary judgment motion as unopposed and should therefore affirm the trial court's summary judgment dismissal of Williams' claims.

B. Williams' Negligence Claim Is Without Merit

Even if this court were to hold that (1) the trial court abused its discretion in striking Williams' untimely response and (2) the trial court erred in concluding that Williams' response was submitted by an attorney unauthorized to practice law in Washington, this court should nevertheless affirm the trial court's dismissal of Williams' negligence action. Williams cannot prevail on a negligence theory against Central Bible because (1) Central Bible owed Williams no duty because Central Bible did not use its sidewalks for any "special purpose" or insert an artificial condition on the

land, and (2) even if Central Bible owed a duty to Williams as an invitee, Central Bible nevertheless owed Williams no duty because the crack was an open and obvious condition of which Williams had knowledge. Further, the facts do not support Williams' negligence claim because she failed to present evidence of the sidewalk's condition or to identify the location of the accident.

1. Standard of Review

This court reviews a trial court's order granting summary judgment de novo. *Loeffelholz v. Univ. of Wash.*, 175 Wash.2d 264, 271, 285 P.3d 854 (2012). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The court views the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *Lakey v. Puget Sound Energy, Inc.*, 176 Wash.2d 909, 922, 296 P.3d 860 (2013). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wash.2d 545, 552, 192 P.3d 886 (2008). If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment. *M.A.*

Mortenson Co. v. Timberline Software Corp., 140 Wash.2d 568, 579, 998 P.2d 305 (2000). The nonmoving party

> may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wash.2d 1, 13, 721 P.2d 1 (1986).

In Williams' negligence action against Central Bible, she had the burden of proving the existence of a duty, breach of that duty, resulting injury, and proximate cause. *Tincani v. Inland Empire Zoological Society*, 124 Wash.2d 121, 127-28, 875 P.2d 621 (1994). At issue on summary judgment was whether Central Bible owed a duty to Williams as the owner of land abutting a sidewalk. CP at 488. Whether a duty exists is a question of law that this court reviews de novo. *Tincani*, 124 Wash.2d at 128.

2. Landowners Owe No Duty to Pedestrians on Abutting Sidewalks Absent Narrow Circumstances Not Present in this Case

Washington law sets a clear standard in cases involving pedestrian accidents on sidewalks. Generally, an owner or occupant of land abutting a public sidewalk is not an insurer of the safety of pedestrians using the

sidewalk. *Rosengren v. City of Seattle*, 149 Wn.App. 565, 570, 205 P.3d 909 (2009). However, a duty can arise in one of two circumstances.

a. No duty under special use doctrine

First, under the "special use" doctrine, a landowner has a duty to exercise reasonable care when using the sidewalk for its own special purposes. *Hofstatter v. City of Seattle*, 105 Wn.App. 596, 601, 20 P.3d 1003 (2001) (citing *Stone v. City of Seattle*, 64 Wash.2d 166, 391 P.2d 179 (1964)). When the landowner uses the sidewalk for its own special purposes, its duty is "to maintain the walk in a reasonably safe condition for its usual and customary usage by pedestrians." *Id.* at 601.

In the majority of special use cases involving sidewalks in which a duty was found, the landowner caused the dangerous condition by driving repeatedly over the sidewalk. See *Stone*, 64 Wash.2d at 168 (apartment owner owed duty to injured pedestrian from falling in hole in sidewalk created by tenants' repeated driving over sidewalk); *James v. Burchett*, 15 Wash.2d 119, 129 P.2d 790 (1942) (abutting property owner owed duty of care to pedestrian who slipped and fell on gravel accumulated on sidewalk because of vehicles exiting from owner's graveled driveway); *Edmonds v. Pac. Fruit & Produce Co.*, 171 Wash. 590, 591, 18 P.2d 507 (1933) (landowner owed duty to injured plaintiff who fell into a depression in the sidewalk caused by owner's repeated driving over sidewalk); *Groves v. City*

of Tacoma, 55 Wn.App. 330, 777 P.2d 566 (1989) (use of public sidewalk as exit from driveway gave rise to duty of reasonable care). Here, there is no evidence that Central Bible made special use of the sidewalk. And notably, unlike the abovementioned cases, there was no evidence that vehicles drove over the sidewalk or that the sidewalk was otherwise subjected to excessive wear and tear. Accordingly, Central Bible owed Williams no duty under the special use doctrine.

b. No duty based on artificial condition

The second exception to the general no-duty rule is where the landowner has created an artificial condition affecting the sidewalk. *See Rosengren*, 149 Wn.App. at 575. In *Rosengren*, a pedestrian sued landowners for personal injuries sustained when the pedestrian tripped over a raised portion of sidewalk abutting the landowners' property. 149 Wn.App. at 568. The plaintiff submitted evidence that the sidewalk's hazardous condition was caused by the roots of trees the landowners had planted three feet from the sidewalk, but the trial court dismissed the claim on summary judgment, holding that the landowners owed no duty to the plaintiff. *Id.* at 568-69. Division One reversed, holding that

> trees planted by a landowner are an artificial condition on the land, and ... an abutting land owner has a duty to exercise reasonable care that the trunks, branches, or roots of trees planted by them adjacent to a public sidewalk do not pose an unreasonable risk of harm to a pedestrian using the sidewalk.

Id. at 575.

Here, Williams submitted a declaration from Alkenneth Gurley, a church attendee present on the day Williams allegedly suffered her injuries.[3] CP at 617-19. Gurley stated in his declaration that:

> There is a tree planted approximately 8-10 feet from the raised cracks in the sidewalk where the incident took place.
> ...
> I have a background in horticulture. I can state that based on my experience, it is possible that the roots of a tree in such close proximity to the raised cracks in the sidewalk could have caused damage to the sidewalk.

CP at 618.

Even if this court were to consider the affidavit, Gurley's statement that it was "*possible*" that the tree roots "*could* have caused damage to the sidewalk" was entirely speculative and, therefore, was insufficient to raise a genuine issue of fact. CP at 618 (emphasis added); *see Seven Gables*, 106 Wash.2d at 13. Other than Gurley's speculation, Williams presented no evidence that the trees were an artificial condition that created a duty on Central Bible's part. Further, even if the trees created a duty, the absence of any evidence linking the trees' presence to the allegedly dangerous sidewalk condition shows that Williams cannot establish any breach if a duty did arise.

[3] As discussed above, this court should decline to consider the materials stricken by the trial court, including Gurley's declaration. This section of Respondent Central Bible's brief is submitted in the event this court holds that the trial court improperly treated Williams' motion as unopposed.

Moreover, Gurley was not presented as an expert and did not provide relevant background information, education, or experience that would qualify him as a tree expert. There is also no evidence that Gurley had knowledge of the tree's root system, that he inspected the tree, or even knew what type of tree it was. Gurley's alleged familiarity with horticulture does not qualify him as an expert entitled to render an opinion that trees planted 8-10 feet from the sidewalk could even conceivably have caused the hazardous condition at issue here. *Cf. Rosengren*, 149 Wn.App. at 568-69 (plaintiffs submitted declaration from city arborist on summary judgment regarding trees planted only three feet from sidewalk).

3. Cracked Sidewalk Was an Obvious Condition of which Williams Had Knowledge

Even if this court holds that Central Bible owed a duty to Williams as an invitee, Central Bible nevertheless owed no duty to Williams because she knew the crack existed, it was not concealed, and Central Bible had no reason to believe the crack posed a risk to pedestrians. Landowners owe an affirmative duty to invitees on their land to "use ordinary care to keep the premises in a reasonably safe condition." *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash.2d 43, 49, 914 P.2d 728 (1996). However, if the condition on the land is "'known or obvious'" to the invitee, the landowner is not liable for harm caused by the condition "'unless the possessor should anticipate the

harm despite such knowledge or obviousness.'" *Id.* at 50 (internal quotation marks omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 343A(1)).[4]

Here, Williams knew the crack existed. She testified that she could see the crack as she approached. CP at 505. Further, the crack was an obvious condition, and there is no evidence that the crack was concealed or otherwise indiscernible to passersby. *Cf. Edmonds*, 171 Wash. at 591 (sidewalk contained holes such that when it rained, "these holes were more or less filled with muddy water and not readily discernible by a pedestrian using the sidewalk.").

Williams nevertheless references Gurley's declaration in which he states that "[w]hen you stand on the sidewalk and look uphill, you don't see the raise[d] crack in the sidewalk until you get almost on top of i[t] because it is off to the edge of the sidewalk." CP at 618; Br. of Appellant at 6. However, Gurley's statement that from one particular angle and at a particular distance the crack may be hard to see does not change the fact that (a) Williams saw the crack as she approached, and (b) there is no evidence that the crack was not readily visible. Apart from Gurley's vague statements, Williams provides no evidence that the crack was concealed.

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[4] The cases in this section involve landowners' duties to invitees *on their own land.* Here, Williams allegedly suffered her injuries on a sidewalk owned and maintained by the city. Although this fact clearly is a bar to Central Bible's liability, this portion of Respondent Central Bible's brief is nevertheless provided for the court's information to highlight that even assuming the injury did occur on Central Bible's property, Williams' claim would fail.

Finally, Central Bible had no reason to anticipate the harm from a cracked sidewalk. Even assuming Gurley's declaration was admissible, he stated that the crack was "off to the edge of the sidewalk." CP at 618. Therefore, there is no evidence that a reasonable pedestrian would have been unable to navigate the sidewalk without being subjected to the alleged risk of the crack. Further, there is no evidence that Central Bible was aware that the crack posed an unreasonable danger because there were no prior incidents, accidents, or complaints relating to the sidewalk. Central Bible's pastor, Louis Diana, received no reports from his maintenance staff regarding the sidewalk or any requests for repairs. CP at 514. Central Bible owed Williams no duty to protect her against a danger of which she was aware and that was unconcealed and obvious.

4. Williams Failed to Provide Evidence Regarding the Sidewalk's Condition or the Location of the Accident

Williams bears the burden of proving the existence of a duty, breach of that duty, resulting injury, and proximate cause. *Tincani*, 124 Wash.2d at 127-28. However, she was unable to provide any evidence regarding the nature of the sidewalk's defect or to otherwise describe it in order to meet her burden of proving that the condition gave rise to a duty, that the condition amounted to breach of that duty, or that the condition conceivably could have caused her injury.

In *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 972 P.2d 475 (1999), the plaintiff sued Bally's when she suffered injuries after falling from a treadmill at a Bally's gym. *Id.* at 375. This court affirmed the trial court's summary judgment dismissal of the claims against Bally's for insufficient evidence of proximate cause because the plaintiff was unable to provide any evidence of the events surrounding the accident. *Id.* at 379-80. In reaching this result, this court relied on the plaintiff's deposition testimony in which she testified that she had no memory of the events preceding her fall from the treadmill. *Id.* at 378. This court held: "Marshall gave clear answers to unambiguous deposition questions that demonstrate her total lack of memory regarding the accident. As such, Marshall cannot now point to isolated excerpts from her deposition testimony as establishing a genuine issue of material fact." *Marshall*, 94 Wn.App. at 379. The court reasoned that "[w]ithout any memory of the accident, Marshall simply offers a theory as to how she sustained her injuries. But a verdict cannot be founded on mere theory or speculation." *Id.* at 379. Accordingly, the court held: "In short, Marshall provides no evidence that she was thrown from the machine, what caused her to be thrown from the machine, or how she was injured. Given this failure to produce evidence explaining how the accident occurred, proximate cause cannot be established." *Id.* at 379-80.

Here, although Williams alleges that there was a crack in the sidewalk, she testified that she could not recall whether it was a "crack" or a "hole":

> Q. Ms. Williams, ... prior to the actual fall out of the wheelchair, did you observe anything on the sidewalk that caused you any concern?
> ...
> A. No.
> ...
> Q. Did you see any cracks in the sidewalk?
> A. I don't remember. Well, I remember seeing – let me start – as we got closer, I – I saw a – it was a hole or crack. That's – that's all I ... can remember.

CP at 505. Further, she could not provide any description of the crack or hole or the sidewalk's general condition:

> Q. ... [Y]ou can't tell me what size the hole is; is that correct?
> A. That's correct.
> Q. Could you tell me if it was a difference in height? Was there ... one part ... higher or lower on the sidewalk?
> A. I don't remember.

CP at 510.

In addition, Williams could not affirmatively state that she hit the crack and could not describe any facts surrounding the incident:

> Q. ... I understand that the wheelchair impacted the hole or the crack that you saw; is that correct? Your wheelchair hit the hole?
> A. I believe so.

Q. Okay. Do you have a memory of that happening, or are you guessing that it happened?
A. No. I'm – I'm not guessing ... . We was [sic.] going so fast, and the wheelchair apparently hit that crack.
...
Q. ... You're using the word "apparently." Do you have a memory of actually hitting the crack, or do you know?
A. Can I say, if I may, it's in my mind. It's – it's fright. It's fright in my mind. I was – it was happening so fast. But I saw that – I saw that – that – that crack, and – and I felt the – the impact of the – of the –I – I felt it. ...
Q. Okay. How much time passed from when you saw the hole or the crack before you ... believe you impacted it?
A. I don't know.
Q. Seconds?
A. I – I don't remember that. I don't – it was going – he was going so fast.
Q. But you don't know how much time passed before you saw the crack and then you impacted it?
A. No.
Q. Okay. Do you know what side of your wheelchair hit the crack, or was it both sides that hit the crack or the hole?
A. I don't remember that.

CP at 506-07. Further, when shown photographs of the sidewalk adjacent to the church, Williams stated that she did not remember the accident taking place there. CP at 509-10.

As in *Marshall*, summary judgment dismissal of Williams' negligence claim was appropriate because Williams' "clear answers to unambiguous deposition questions ... demonstrate her total lack of memory

regarding the accident." 94 Wn.App. at 379. Just as the plaintiff in *Marshall* was unable to describe the incident other than the fact that she had used the treadmill and that she was subsequently injured, here, Williams could not describe whether what caused her accident was a hole or a crack, the size, shape, or other characteristics of that hole or crack, where her wheelchair hit the hole or crack, or whether the hole or crack caused her to be thrown from the wheelchair. Therefore, Williams' theory that the crack caused her to fall from her wheelchair was based on "mere theory or speculation" and, therefore, cannot withstand summary judgment. *Marshall*, 94 Wn.App. at 379. Accordingly, this court should affirm the trial court's dismissal of Williams' claims.

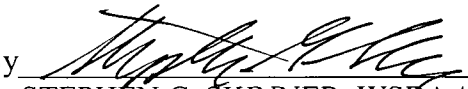
V. CONCLUSION

Williams submitted an untimely response to Central Bible's summary judgment motion after failing on two occasions to comply with the court rules governing time for responding to such motions. Further, the untimely response was submitted by an attorney previously admitted to limited practice in Washington but whose authorization to practice had been voided by local associated counsel's withdrawal. Accordingly, the trial court did not err when it struck Williams' response and treated Central Bible's summary judgment motion as unopposed. Further, even if this court were to address the merits of Williams' negligence action, her

claim must fail because (1) she failed to present evidence supporting it and (2) Central Bible owes Williams no duty as a matter of law. For the foregoing reasons, Central Bible respectfully requests that this court affirm the trial court's summary judgment order.

RESPECTFULLY SUBMITTED this 6th day of August, 2014.

ANDREWS ▪ SKINNER, P.S.

By 

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DECLARATION OF SERVICE

I, Jane Johnson, hereby declare as follows:

1. I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the 6th day of August, 2014, I caused a copy of the foregoing BRIEF OF RESPONDENT CENTRAL BIBLE EVANGELICAL CHURCH to be sent for service upon the following in the manner indicated:

Appellant:
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~~Lansing, MI 48909~~
(MAIL RETURNED from address on Appellant's Opening Brief)
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of August, 2014, at Seattle, Washington.

Jane Johnson, Legal Assistant