

NO. 295516

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

TOBY J. TODD,

Appellant,

v.

**RIVER RIDGE HARDWARE, INC., a Washington Corporation, and
BRIAN POIRIER and JANE DOE POIRIER, husband and wife,**

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case regards a two-vehicle accident which occurred on January 13, 2009, in the city of Spokane. The Appellant, Mr. Toby J. Todd (hereinafter “Todd”), failed to yield the right of way when he entered into the intersection of North Milton Street and Driscoll Boulevard when it was not clear to do so. Todd was driving a full-size 2008 Dodge Ram 1500 pickup truck and was “t-boned” just behind his driver’s side door by another car described as a silver sedan.

Todd claims as he was stopped at the stop sign on northbound Milton Street at the intersection of Driscoll Boulevard, his view of oncoming southbound traffic on Driscoll Boulevard was obstructed by a large pile of snow. Up to the day of the accident, the Spokane area had received over 6½ feet of snow. It is undisputed the snow pile which Todd claims obstructed his view was located in the city right of way of that intersection. The River Ridge Hardware store is located on a short block facing Driscoll Boulevard with North Milton Street to its south, and Garland Avenue to its north. There is a sidewalk and green belt separating the River Ridge parking lot from the location of the snow pile at issue.

River Ridge denies it created, contributed to, or maintained the snow pile at issue.

Todd filed suit against River Ridge Hardware, Inc. and its owner, Brian Poirier (hereafter collectively referred to as “River Ridge”). Todd did not file suit against the driver of the silver sedan. Todd also failed to name as a defendant the City of Spokane, which is charged with the duty to maintain the city right of ways.

Approximately one month prior to the discovery cutoff date set forth in the trial court’s Scheduling Order, River Ridge moved for summary judgment. In response to River Ridge’s motion, Todd failed to, or chose not to, submit any affidavits, declarations, exhibits, or other evidence other than a responsive brief in opposition to the Motion for Summary Judgment. The trial court found River Ridge met its initial burden in showing there was no genuine issue of material fact. The court ruled Todd failed to meet his burden, as the nonmoving party, to submit admissible evidence which created a triable issue or genuine issue of fact. The trial court correctly granted River Ridge’s motion for summary judgment.

Pursuant to the record on appeal, River Ridge respectfully requests the trial court's order granting the Motion for Summary Judgment be affirmed.

II. ASSIGNMENTS OF ERROR

Todd identifies one assignment of error as follows:

The trial court erred by granting Defendant's Motion for Summary Judgment where Defendant failed to meet its initial burden of establishing the absence of a material question of fact.

Todd's issue pertaining to assignment of error:

Where the Plaintiff in an action for damages alleges that an automobile accident in which he sustained injuries was caused by Defendant's negligence in creation of a large pile of snow obstructing his view at an intersection, is the Defendant entitled to summary judgment where the Defendant fails to come forward with any evidence showing that Defendant was not responsible for creating the obstruction and fails to demonstrate the absence of any evidence to support Plaintiff's claim?

III. STATEMENT OF THE CASE

Spokane experienced a near record-setting snowfall in the winter of 2008/2009. RP page 2, lines 14-22 (pages and lines hereafter

designated as 2:14-22), RP 19:15-19. From December 1, 2008 to the time of the accident, January 13, 2009, Spokane received approximately 78.8 inches, or in excess of 6½ feet, of snow. CP 15, 42, 51. The accumulated snow and weather conditions required all drivers in the City of Spokane to take extra care to look over snow berms and plowed snow near street corners and parking lots. RP 2:16-25, 3:1-3. The conditions of high snow berms and plowed snow were not unique to the intersection of North Milton Street and Driscoll Boulevard on the date of the accident. *Id.*

River Ridge Hardware Store is located at 2803 W. Garland Avenue in Spokane. CP 3. The store sits on an approximate half of a block between Garland Avenue to its north and Milton Street to the south. CP 15, 60. The store faces Driscoll Boulevard. *Id.* On the morning of January 13, 2009, Todd was driving a 2008 Dodge Ram pickup truck northbound on Milton Street. CP 3. Northbound traffic on Milton Street is controlled by a stop sign at the intersection of Driscoll Boulevard. *Id.* Traffic on Driscoll Boulevard is not controlled at the intersection with Milton Street and has the right of way. CP 15.

Todd was at the stop sign on northbound Milton Street at the intersection of Driscoll for approximately a minute. CP 69. During that

time, Todd claims his view of southbound traffic on Driscoll was obstructed by a pile of snow located near the corner of Driscoll and Milton. CP 3, 79, 81.¹ It is undisputed the snow pile at issue was located on the right of way, or street, of Driscoll and Milton, not on River Ridge property. *Id.*; RP 11:24-25, 12:1-3, 17:14-22, 20:3-10. There was no other visual obstruction to Todd except for the snow pile. CP 16, 66.

From where Todd was stopped on Milton Street, he could clearly see to his north a stop light regulating traffic for southbound vehicles on Driscoll at the intersection of Garland Avenue. CP 16, 71, 79, 81, 83. Due to the extensive amount of snowfall, and subsequent city plowing, a snow burm was created from the curb next to the southbound lane of Driscoll Boulevard outward which restricted approximately half of the southbound lane of Driscoll heading towards the intersection with Milton Street. CP 16, 68, 75, 76.

While stopped on Milton Street, there were no vehicles directly behind Todd's pickup truck. CP 16, 67. There was nothing preventing

¹ The photographic exhibits to Todd's deposition designated as CP 79 and 81 were taken by Todd at the scene of the accident. The photograph designated as CP 83, or Exhibit 3 to the deposition, was taken by the defense subsequent to suit being filed. Due to the poor scan quality of the photographs received by the Court of Appeals, River Ridge has attached better quality duplications of the photographs designated as CP 79, 81, and 83 as an Appendix to this brief.

Todd from backing up and choosing another route. *Id.* Instead, Todd began to inch his full-size pickup forward to see if it was clear to proceed across Driscoll and continue northbound on Milton St. CP 16, 67, 68. Todd estimates the front of his pickup truck was approximately halfway across Driscoll Boulevard when he accelerated to proceed across the remaining distance. CP 3, 16, 68-70.

As Todd began to accelerate across the remaining portion of Driscoll Boulevard, his truck was struck behind the driver's side door by the front of a vehicle traveling southbound on Driscoll. CP 16, 70.

While waiting for the police to arrive to the site of the accident, Todd witnessed a Spokane City bus get stuck in the snow berm on the opposite, or east, side of Driscoll Boulevard. CP 17, 72.

Todd has maintained a Commercial Driver's License, or CDL, since 2004. CP 17, 65. Todd concedes as a professional driver, he had a duty to yield the right of way to traffic on Driscoll Boulevard. CP 17, 75. Todd does not believe the driver of the other vehicle, which struck his pickup, was at fault for the cause of the motor vehicle accident. CP 17, 75, 76.

Todd did not witness any representative of River Ridge actually plowing, piling, maintaining or otherwise contributing to the pile of snow which was located on the right of way of Driscoll Boulevard and Milton Street. CP 17, 76. Todd never spoke with or provided notice to a representative of River Ridge of his claim the snow pile located in the city right of way obstructed his view of traffic. CP 17, 76, 77.

Todd filed his Complaint for Damages in Spokane County Superior Court on November 3, 2009. CP 2. River Ridge's Answer denying Todd's claims was filed with the trial court on November 23, 2009. CP 6-9. On February 5, 2010, the parties, by and through their attorneys of record, attended a case scheduling conference with the trial court to set a trial date. (See Civil Case Schedule Order attached to Respondent's Supplemental Clerk's Paper, presumably CP 112); RP 18:17-25. On the date of the conference, the trial court issued a Case Scheduling Order. *Id.* The scheduled discovery cutoff date was set as December 13, 2010 and the trial date was scheduled to commence on January 31, 2011. *Id.* River Ridge filed its Motion for Summary Judgment and supporting affidavit and exhibits on October 1, 2010. CP 14. Todd had not propounded any written discovery until two days prior

to the Motion for Summary Judgment was filed and did not request to take any depositions of River Ridge representatives, including Mr. Poirier, until after the Motion for Summary Judgment was filed. CP 104, 105. Todd did not move the Court for an Order continuing the hearing on the Motion for Summary Judgment under CR 56(f) or any other theory. CP 104; RP 18:17-25, 19:1-12. Todd had nearly 11 months to litigate and seek evidence to support his claims against River Ridge. CP 2, 14.

Todd failed to, or chose not to, produce an affidavit, declaration, exhibits, or any other evidence to oppose River Ridge's Motion for Summary Judgment. Instead, Todd filed a brief in response containing law and argument. CP 84-92.

IV. ARGUMENT

A. Standard of Review

An order granting a motion for summary judgment is reviewed *de novo*. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). The appellate court undertakes the same inquiry as the trial court, viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Id.*; *Thompson v. Peninsula School Dist.*, 77 Wn.App. 500, 504, 893 P.2d 760 (1995). Summary Judgment is appropriate where

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

B. Summary Judgment was Appropriate as Todd Failed to Meet His Burden to Produce Admissible Evidence the Snow Pile at Issue was Created, Contributed to, or Maintained by River Ridge.

The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12, 721 P.2d 1 (1986). The defendant moving for summary judgment may meet its initial burden of demonstrating there is no genuine issue of material fact by pointing out that there **is an absence of evidence to support the plaintiff's case.** *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 and FN.1, 770 P.2d 182 (1989) (emphasis added); *Weatherbee v. Gustafson*, 64 Wn.App. 128, 131, 822 P.2d 1257 (1992). Once the moving party meets this initial burden, the non-moving party must produce evidence which supports a *prima facie* case concerning every essential element of the claims made. *Id.* Where the non-moving party fails to demonstrate an issue of material fact, “there can be no genuine issue of material fact’ since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily

renders all other facts immaterial.” *Id.*, *Weatherbee*, 64 Wn.App. at 132, 822 P.2d 1257.

To survive a motion for summary judgment, the plaintiff must respond to the motion with more than conclusory allegations, speculative statements or argumentative assertions of the existence of unresolved factual issues. *Walker v. King County Metro*, 126 Wn. App. 904, 912, 109 P.3d 836 (2005); CR 56(e). The plaintiff must present admissible evidence that establishes the existence of a genuine dispute on each of the elements of his claim. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348 (1986); *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Further, the plaintiff cannot create a genuine issue for trial by submitting an affidavit containing “bare allegations” of fact without any supporting evidence or rest upon mere allegations or denials. *Seven Gables Corp.*, 106 Wn.2d at 13, 721 P.2d 1.

In the case at bar, it is Todd’s sole assignment of error that River Ridge failed to meet its initial burden as the moving party by merely claiming there was a lack of evidence to support Todd’s case. App. Brief at 1. Todd is incorrect. As set forth above, the moving party in a

summary judgment may meet its initial burden of demonstrating there is no genuine issue of material fact by pointing out there is an absence of evidence and Todd cannot establish a *prima facie* case or triable issue as to every element of his claims. *Young*, 112 Wn.2d at 225 at fn.1, 770 P.2d 182; *Weatherbee*, 64 Wn.App. at 131-132, 822 P.2d 1257. In support of its Motion for Summary Judgment, River Ridge relied upon Todd's own deposition testimony, Todd's photographs of the snow pile at the intersection at issue which he took while at the accident scene, certified NOAA reports, the law and argument set forth in its Memorandum of Authorities and Reply Memorandum authorities. CP 14-83, 94-106. Essentially what Todd is arguing is that it was River Ridge's burden to prove a negative, specifically that River Ridge did not create, maintain, or contribute to the snow pile which was located in the right of way of Milton Street and Driscoll Boulevard. Todd was placed on notice that River Ridge specifically denied his claims when River Ridge filed its Answer and Affirmative Defenses on November 23, 2009. CP 6-9. Todd is attempting to shift his burden to prove every essential element of his claims by a preponderance of the evidence onto River Ridge. His argument is without merit and is in derogation of well established

authority that the plaintiff bears the burden of proof throughout the case.

American Products Co. v. Villwock, 7 Wn.2d 246, 275, 109 P.2d 570

(1941). In *American Products Co.*, the State Supreme Court ruled as follows:

Furthermore, the burden of proving negligence by a preponderance of evidence rests upon the party alleging it, and the party charged is not required to assume the burden of proving that he was not negligent, but is only required, in response to a *prima facie* case of negligence made against him, to come forward with evidence excusatory of his negligence. The extent to which he must go in that respect is only to the point of producing evidence sufficient to balance the scales upon that issue. Beyond that, he is not required to go. The original burden of proving negligence by a preponderance of the evidence remains throughout the case upon the party charging negligence.

Id., at 275, 109 P.2d at 582. Here, Todd did not produce evidence of even a *prima facie* case which River Ridge was required to respond to.

Todd relies on the case of *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 757 P.2d 507 (1988) for the proposition River Ridge failed to produce an alternative version of facts to Todd's claims. App. Brief at 4. Todd's argument in reliance upon the *Hash* case is misplaced. In *Hash*, the issue in dispute was whether the child plaintiff's fractured leg was proximately caused by the defendant's physical therapy treatment. *Hash*, 110 Wn.2d at 913-14, 767 P.2d 597. It was undisputed

that the plaintiff was in direct contact with the defendant and was being treated by the defendant when the injury occurred. *Hash* is distinguishable from the case at bar. It is undisputed Todd never went onto the property of River Ridge, was not a business invitee of River Ridge, and that Todd's claimed injuries were caused when another vehicle impacted the driver's side of Todd's full-size pickup when Todd failed to yield the right of way. CP 15-17. In fact, Todd conceded at oral argument on the Motion for Summary Judgment that, "There is no landowner liability here. There is nothing to indicate that anything happened on the River Ridge premises." RP 11:24-25, 12:1-3.

Further, it is undisputed the snow pile at issue was located in the street, or a City of Spokane-maintained right of way on the southwest corner of Milton Street and Driscoll Boulevard. Additionally, the snow pile was separated from the River Ridge parking lot by a City-owned sidewalk, shrubbery, and vegetation. CP 79, 81, 83 (Appendix). It is further undisputed the motor vehicle accident which directly caused Todd's claimed injuries occurred in the middle of Driscoll Boulevard. CP 68, 69. Todd failed to bring suit against the other driver or the City of Spokane. Instead, Todd brought claims of negligence against the nearest

private landowner, which happened to be River Ridge. These undisputed facts are more than sufficient to establish River Ridge met its initial burden of proving there was an absence of evidence to support Todd's claims. *Young*, 112 Wn.2d at 225 and fn.1, 770 P.2d 182; *Weatherbee*, 64 Wn.App. at 131, 822 P.2d 1257.

Upon River Ridge meeting its initial burden, the burden shifted to Todd to produce admissible evidence, through sworn testimony or other evidence, there was a genuine dispute on each of the elements of his claim. *Matsushita Elec. Indus. Co. Ltd.*, 475 U.S. at 585-86; *Young, supra*. Todd failed to meet his burden. Todd did not submit an affidavit attempting to clarify his sworn deposition testimony in response to River Ridge's Motion. Todd did not produce an affidavit from the other driver or a representative of the City of Spokane regarding the snowplowing at that intersection. Todd did not submit an affidavit or declaration from the responding police officer or any other witness. RP 17:23-25, 18:1-25, 19:1-13. Todd did not move the court for a continuance on the hearing under CR 56(f) or other theory to obtain affidavits or depositions. Instead, Todd submitted a 9-page brief alleging because River Ridge's parking lot was clear it must have created the pile of snow. The trial court correctly

found and held this conclusory allegation and speculation by Todd cannot constitute a reasonable inference to generate a material issue of fact. RP 19:14-25, 20:1-25. Todd was obligated to respond to River Ridge's Motion for Summary Judgment with more than conclusory allegations, speculative statements, and bare assertions. *Walker*, 126 Wn.App. at 912, 109 P.3d 836; *Seven Gables Corp.*, 106 Wn.2d at 13, 721 P.2d 1. Todd was required to "set forth specific facts showing that there is a genuine issue for trial." CR 56(e). Because Todd failed to do so, summary judgment was appropriate. *Id.* The trial court correctly ruled, even in considering the evidence in a light most favorable to Todd, there was no genuine issue of material fact and River Ridge was entitled to judgment as a matter of law.

C. **Todd Provides No Authority the Trial Court Erred by Hearing the Motion for Summary Judgment Prior to the Close of Discovery.**

Todd next argues the trial court erred because the discovery deadline had not yet passed and there was more discovery to be conducted. App. Brief at 6, 7. First, Todd did not move the trial court for a continuance. *See* CR 56(f). There is absolutely no requirement that discovery be completed prior to a court's hearing and granting a motion

for summary judgment. Further, vague reference to discovery yet to be completed is not sufficient to delay a summary judgment motion. A party requesting a continuance must show good reasons for the delay in not obtaining the evidence, what specific evidence the party will establish with additional discovery, and that the new evidence would create a material issue of fact. *See e.g. Leven v. Kretzler*, 56 Wn.App. 349, 352, 783 P.2d 611 (1989). Todd did not do so other than to state he had not deposed the defendant or the defense witnesses. Such a vague assertion is not sufficient. *Id.* There is no good reason why Todd failed to depose these individuals.

The only specific contention made by Todd is that there were outstanding interrogatories and requests for production. However, these were not served on River Ridge until September 29, 2010, two days before River Ridge filed its Motion for Summary Judgment. Todd failed to make any representation as to how answers to this discovery would create a material issue of fact. CP 104, 105. Todd had a significant amount of time to conduct discovery in this case and chose not to.

D. Todd Failed to Meet His Burden of Establishing Either a Prima Facie Case or a Triable Issue of Negligence Against River Ridge.

In order to maintain an action for general negligence, Todd must show (a) River Ridge owed a duty to him, (b) River Ridge breached that duty, (c) Todd was injured and (d) River Ridge's breach was the proximate cause of the injury. *Seiber v. Poulsbo Marine*, 136 Wn.App. 731, 738, 150 P.3d 633 (2007). The threshold determination in a negligence action is whether or not the defendant owed the plaintiff a duty. *Vergeson v. Kitsap County*, 145 Wn.App. 526, 535, 186 P.3d 1140 (2008); *Hannum v. Wash. State Dep't of Licensing*, 144 Wn.App. 354, 181 P.3d 915 (2008) ("cause of action for negligence exists only if defendant owes a duty of care to plaintiff"). Such a determination is a question of law and "depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Kaltreider v. Lake Chelan Community Hosp.*, 153 Wn.App. 762, 765, 224 P.3d 808 (Div. 3 2009). Breach of a duty and proximate cause are generally questions for the trier of fact. However, if reasonable minds cannot differ, then these elements of negligence may be determined as a matter of law by the court. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400, 406 (1999).

1. River Ridge Did Not Owe Todd a Duty.

Washington Courts have not imposed a duty upon a property owner to protect visitors from dangers on adjacent land. 16A DeWolf & Allen, Wash. Practice: Tort Law and Practice at § 17.2, p. 548 (2006), citing *McMahon v. Benton County, et al.*, 88 Wn.App. 737, 946 P.2d 1183 (1997). Further, an entity which does not possess land owes no duty of care to prevent an unreasonable risk of harm arising from a condition occurring on the land near a public way. *Coulson v. Huntsman Packaging Prod., Inc.*, 121 Wn.App. 941, 942, 92 P.3d 278, 279 (2004), *rev. denied*, 153 Wn.2d 1019 (2005). In the *Coulson* case, the plaintiff driver collided with a tractor trailer in an intersection when he failed to obey a stop sign. The plaintiff sued the adjoining landowner claiming negligence in failing to maintain a nearby tree so as to keep its limbs from obstructing the view of the stop sign. *Id* at 942, 92 P.3d at 279. Even though the defendant frequently maintained the shrubbery and planting strip around the stop sign, the court held it did not become a “possessor” of the planting strip in exclusion of the city’s ownership by such maintenance. *Id.* at 948, 92 P.3d at 282. A landowner only has a duty to keep his premises in a condition so adjacent public ways are not rendered unsafe for ordinary travel if there is

a duty to correct the unsafe condition. *Re v. Tenney*, 56 Wn.App. 394, 793 P.2d 632 (1989).

In the case at bar, it is undisputed the snow pile at issue was located in the right of way of Milton Street and Driscoll Boulevard, which is maintained by the City of Spokane, and not River Ridge. This fact was undisputed by Todd. Todd provided no evidence the pile was under the control of River Ridge. Todd provided no evidence River Ridge created or contributed to the snow pile. Even if River Ridge had contributed to the pile's creation, it would have been the duty of the City of Spokane to mitigate the pile of snow if it chose to, not River Ridge. *Coulson*, at 948, 92 P.3d at 282.

Todd in effect asks this Court to ignore Washington law and impose a common law duty to not create an unnatural obstruction to the view of drivers approaching the intersection. Todd bases this request on non-Washington cases which are clearly distinguishable and have never been cited to or adopted by either Washington courts or even the Ninth Circuit. Most importantly, Todd has not cited one case to support the implication of such a duty to a landowner.

For example, Todd cites to *Atlantic Ins. Co. v. Kenney*, 591 A.2d 507 (1991), a case from Maryland regarding whether the owner of a tractor trailer was negligent in parking his tractor trailer while making a delivery because the trailer obstructed the view of another motorist. While the court did rule the trailer was parked negligently, the court based its decision on Restatement (Second) of Torts § 303, which has *not* been adopted in Washington.

Todd cites *Quiquin v. Fitzgerald*, 146 A.D. 894 (1989), a New York case which involved a suit for injuries to a child who was struck and injured by a vehicle while buying an ice cream cone from a vendor. The ice cream vendor had parked in a location which obstructed the view of passing motorists. The court found the ice cream vendor liable for the child's injury because the child was a *business invitee* and thus the ice cream vendor owed the child a heightened duty of care. In the case at bar it is undisputed Todd was not a business invitee. CP 3, 4; RP 4:21-25, 5:1-5, 11:24-25, 12:1-3. Todd also cites *Taylor v. State*, 431 So.2d 876 (1983), an appellate decision from Louisiana which is factually distinguishable, unpersuasively brief, and a non-premises liability case.

In order to defeat the summary judgment motion, Todd had the burden to come forward with admissible evidence to create a genuine issue of material fact. Todd offered no evidence other than pure speculation the snow pile must have come from River Ridge because their parking lot was clear. Such a statement cannot be construed to constitute a reasonable inference to defeat a summary judgment motion.

Todd's assertion that it is "irrelevant" whether the snow pile was on the public roadway and sidewalk and not on River Ridge's land is contrary to Washington law. *See e.g. Coulson*, 121 Wn.App. at 948. Washington courts have only held a possessor of land liable to a passerby when an artificial condition on the premises **actually injured** the plaintiff. *See Poth v. Dexter Horton Estate*, 140 Wn. 272, 248 P. 374 (1926) (window shade fell from upper story of window and struck passerby on sidewalk); *Collais v. Buck & Bowers Oil Co.*, 175 Wn. 263, 27 P.2d 118 (1933) (service station who leaked oil onto the sidewalk on which plaintiff slipped and was injured); *Misterek v. Washington Mineral Prods., Inc.*, 85 Wn.2d 166, 531 P.2d 805 (1975) (fence containing horses was in disrepair and horses escaped onto the highway and plaintiff was injured attempting to avoid the horses); *Hutchins v. 1001 Fourth Avenue Assoc.*, 116 Wn.2d

217, 222, 802 P.2d (1991). No Washington case was found which has held a condition which does not **itself** injure the plaintiff imposes liability on a landowner.

The facts of this case do not support an imposition of liability. There is certainly no allegation that the snow pile itself injured Todd. Todd's argument merely because River Ridge's small parking lot was clear it must have created the snow pile is an unreasonable inference and is nothing more than conjecture and speculation.

2. **River Ridge Did Not Breach Any Duty Which May Have Been Owed to Todd.**

Even if the Court were to find some duty owed by River Ridge, reasonable persons cannot differ that River Ridge neither breached any such duty or proximately caused Todd's claimed injuries. A possessor of land has a general duty to "prevent artificial conditions on **his land** from being unreasonably dangerous to highway travelers." *Hutchins*, at 222, 802 P.2d 1360. (Emphasis added). The Supreme Court, in *Younce v. Ferguson*, announced principles which limited imposition of liability on possessors of land. 106 Wn.2d 658, 724 P.2d 991 (1986). Specifically, "(1) a possessor of land should not be subjected to unlimited liability, (2) a possessor of land is not an insurer as to all those who may be affected by

activity involving the possessor's premises; and (3) a possessor of land has no duty as to all others under a generalized standard of reasonable care under all the circumstances." *Younce*, 106 Wn.2d at 667

While the courts have previously held that "the occupier of land generally owes a duty of reasonable care to prevent activities and conditions on his land from injuring persons or property outside his land," such cases have dealt with artificial conditions on the premises which actually injure the plaintiff. *See Poth, supra; Collais, supra; Misterek, supra.*

In *Hutchins*, the Supreme Court looked at the issue of whether a landowner could be liable for injuries resulting from an assault that took place on the sidewalk outside of the owner's premises. 116 Wn.2d 217. That plaintiff alleged the dangerous condition of the premises was the color, design, and adequacy of the lighting of the premises. *Id.* at 223. The court distinguished the case from previous cases involving the possessor's duty because "the artificial conditions *in and of themselves* did not create a risk of harm to a passerby" and the "defendant did not engage in some activity or business on the premises which posed a direct danger to others off premises." *Id.*

There is no claim or evidence the snow pile in the case at bar was 1) on River Ridge premises, or 2) River Ridge was engaged in some activity or business on the premises which posed a direct danger to others off the premises. *Id.* Between December 1, 2008 through the date of the accident, Spokane received over *6½ feet* of snow. The entire city was faced with the issue of what to do with the snow. There were piles of snow on nearly every corner due to the city snow plows. RP 2:16-25, 3:1-3. While waiting for the police to arrive to the scene of the accident, Todd witnessed a city bus became stuck in the snow burm on the **opposite** side of the street from River Ridge. CP 17, 72. The road and winter conditions complained of by Todd were also present for every other driver on city streets.

Unlike prior cases involving a possessor's liability, River Ridge was not engaged in any activity or business on its premises which injured Todd. Todd was injured by his choice to enter the roadway in complete disregard for his statutory obligation to yield to oncoming traffic. River Ridge did not breach any duty to Todd nor did River Ridge proximately cause Todd's claimed injuries.

Todd has failed to provide any evidence to support the position River Ridge breached a duty that may have been owed to Todd.

3. **Todd had the Primary Duty to Avoid the Motor Vehicle Accident at Issue.**

A driver controlled by a stop sign has a duty to not proceed forward until it is clear and safe to do so. *See* R.C.W. 46.61.190(2); WPI 70.02.02. A driver at an intersection where the view of oncoming traffic is obstructed has the duty to make his observations of traffic from a point at which he can clearly observe traffic and not back from the intersection where his view is obstructed. *O'Brien v. Artz*, 74 Wn.2d 558, 561, 45 P.2d 632,634 (1968); WPI 70.02.02; *see Fetterman v. Levitch*, 7 Wn.2d 431, 438, 109 P.2d 1064 (1941) (observations of approaching traffic “must be made from such a point as will enable the driver to see and reasonably decide whether he has, and can maintain, a fair margin of safety”). A disfavored driver’s failure to look upon entering the intersection is negligence. A driver must observe from a point he can see and decide when he can proceed and not from where his view was seriously obstructed. *Delsman v. Bertotti*, 200 Wn. 380, 93 P.2d 371 (1939).

Stopping at a stop sign is not sufficient to relieve a driver of his statutory duty to “stop and look from a position where he can see

approaching traffic.” See *Angelo v. Lawson*, 26 Wn.2d 198, 200-01, 173 P.2d 124 (1946) (citations omitted) (defendant who stopped at stop sign and proceeded into intersection without yielding right of way was negligent and the sole proximate cause of the accident); *Poston v. Mathers*, 77 Wn.2d 329, 462 P.2d 222 (1969) (a favored driver on an arterial protected by a stop sign has one of the strongest rights-of-way which the law allows). A driver has a duty to see what a person exercising ordinary care would have seen and the “mere fact that the view of the disfavored driver is obstructed will not relieve him of the duty of ascertaining whether another vehicle is approaching.” *Fovargue v. Ramseyer*, 73 Wn.2d 574, 579, 439 P.2d 966 (1968); see *Davis v. Bader*, 57 Wn.2d 871, 874, 360 P.2d 352 (1961). In fact, “obstructions to view adverse road and atmospheric conditions **intensify**, rather than diminish, the attentiveness and vehicular control required.” *Sanders v. Crimmins*, 63 Wn.2d 702, 706, 388 P.2d 913 (1964) (emphasis added). Additionally, a “disfavored driver’s obstructed view of a favored vehicle doe not constitute deception.” *Id.*, citing *Smith v. Laughlin*, 51 Wn.2d 740, 321 P.2d 907 (1958). In other words, the driver at an intersection controlled by a stop sign whose view of oncoming traffic is obstructed must inch

forward to a point where oncoming traffic may be determined and proceed only when it is safe to do so. (*Id.*)

In *Rowling v. Sims*, 732 N.W.2d 882 (2007), the Supreme Court of Iowa addressed a case involving a negligence suit arising from an accident where a driver failed to yield the right of way. The disfavored driver claimed that she was excused from her duty to yield the right of way because there was **a pile of snow** which blocked her view. *Id.* at 885; CP 27-32. The court stated that even if her vision was blocked by a snow pile, she had a duty to “stop, look, and listen in order to determine whether there was traffic” before she pulled out onto the street. *Id.* citing *Rubel v. Hoffman*, 229 N.W.2d 261, 265 (Iowa 1975) (it was defendant’s statutory duty to stop, look, and listen in order to ascertain whether there was oncoming traffic before entering the public highway). The court also noted that there was no reason why the defendant had to pull out onto the street, as there were other “reasonably practical actions,” she could have taken in order to “comply with her duty to yield the right of way.” These actions included backing up to a distance sufficient to see oncoming traffic where the pile of snow did not obstruct her view ... position her vehicle on the far right side giving her a better view of traffic or ... inched her vehicle into

the traveled portion of the road until she had an adequate view of the oncoming traffic. *Id.* at 886. The court reasoned that “although these possible alternatives may seem burdensome ... they are not so burdensome when viewed from the perspective of an innocent person who may be injured by the driver’s choice.” *Id.*

In the case at bar, Todd had the statutory duty to yield the right of way to any and all approaching vehicles. Todd’s allegation that his view was obstructed by the snow pile **enhanced** his duty not to proceed into the intersection until it was clear to do so. *Sanders*, 63 Wn.2d at 706. Similar to the *Rowling* case, Todd had the duty to exhaust other options rather than proceeding into the intersection at issue if his view was clearly obstructed. *Rowling*, 732 N.W.2d. at 886. Todd remained stopped on North Milton Street for approximately a minute before beginning to inch into the intersection. CP 69. During that time there were no vehicles behind him. CP 16, 67. There was nothing preventing Todd from reversing his vehicle and choosing an alternative route, reversing his vehicle and moving his truck to the far right side of the northbound lane of Milton Street to view traffic on Driscoll, or backing up to peer through the parking lot of River Ridge to determine oncoming traffic on southbound Driscoll. Todd took

none of these actions. Instead he chose to move forward, inching along and when mistakenly believing the way was clear, accelerated into the intersection and was struck by another vehicle. CP 16, 68-70.

There are other factors which also put Todd in the best position to determine whether he had adequately yielded the right of way before proceeding through the intersection. This included being in a raised position in driving his full-size 2008 Dodge Ram pickup truck. CP 3. From this point of view, by maneuvering his truck backwards, he had the best chance of viewing oncoming traffic. Additionally, there is an overhanging traffic light which controlled southbound traffic on Driscoll at the next intersection north with Garland Avenue. CP 16, 71, 79, 81, 83. This was a short distance away and in clear view of Todd in the position where he was stopped at Milton Street. CP 60, 83.

Todd had the duty to determine whether or not it was safe for him to enter traffic after he stopped at the stop sign. It was Todd's choice to proceed into the intersection without taking the precautions required of him by law. Todd bears the primary responsibility for accelerating into Driscoll Boulevard when it was not clear to do so.

V. CONCLUSION

A party moving for summary judgment may meet its initial burden there is no genuine issue of material fact by arguing there is a lack of evidence to support plaintiff's case. The burden then shifts to the nonmoving plaintiff to give sworn testimony or other evidence a genuine issue of material facts exists. The nonmoving party may not rest upon mere allegations, speculations, conjecture, or merely on his pleadings. Todd failed in his obligation to set forth specific facts showing there is a genuine issue of material fact. The trial court correctly granted the motion for summary judgment.

River Ridge respectfully requests the Court affirm the Order Granting Defendant's Motion for Summary Judgment.

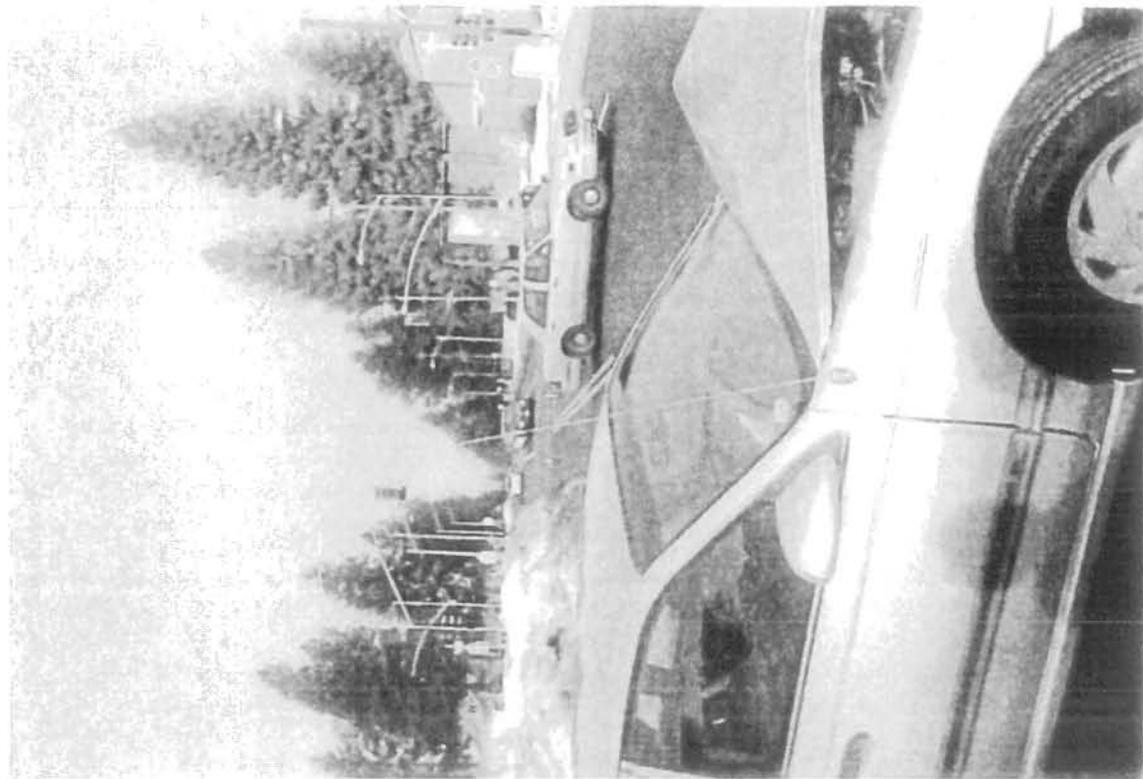
Respectfully submitted this 25th day of March, 2011.

KIRKPATRICK & STARTZEL, P.S.

By: 
PATRICK W. HARWOOD, WSBA 30522
Attorney for Respondents River Ridge
Hardware, Inc. and Brian Poirier

VI. APPENDIX

**PHOTOGRAPHS DESIGNATED AS
CLERK'S PAPERS 79, 81, and 83 ARE ATTACHED**



(a)

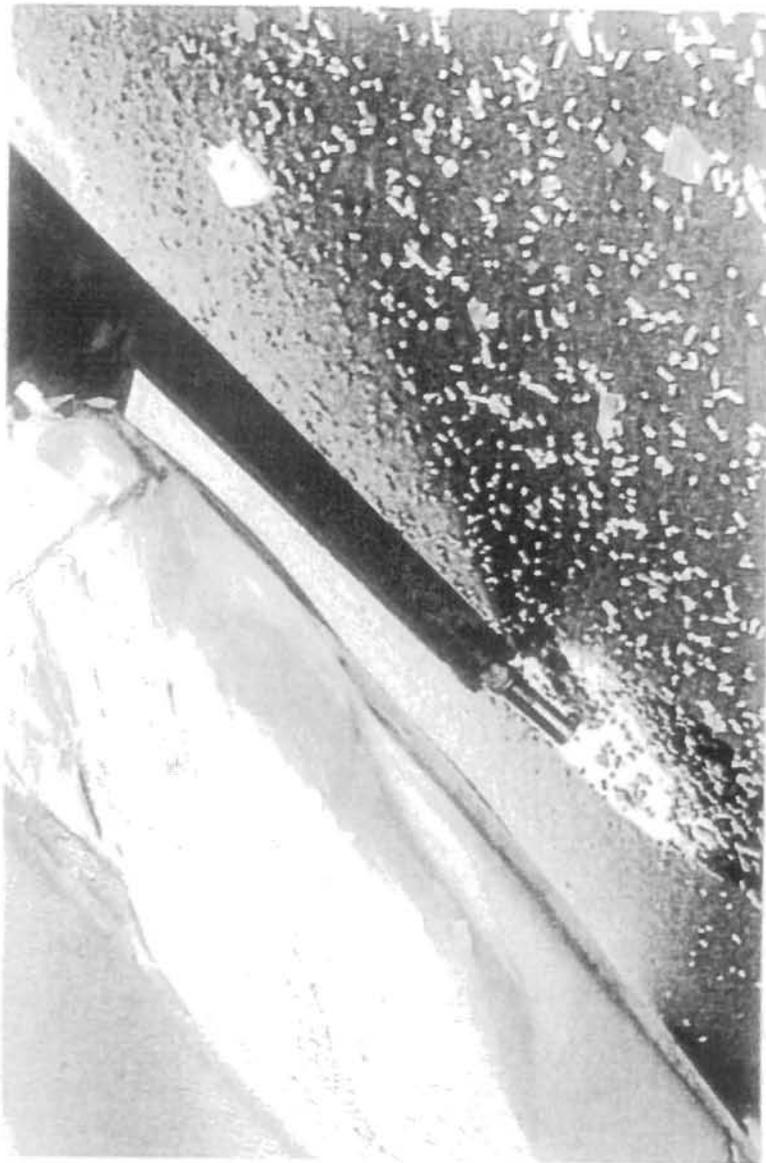


(b)

EXHIBIT
1



(a)



(b)

EXHIBIT
#2



EXHIBIT
#3

CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of March, 2011, I caused to be served a true and correct copy of the preceding document to the following attorney of record as follows:

Richard D. Wall
Richard D. Wall, P. S.
221 W. Main Ave., Ste. 200
Spokane, WA 99201

- Hand Delivery
- U.S. Mail
- Overnight Mail
- Fax Transmission



of Kirkpatrick & Startzel, P.S.