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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By.....

COA Cause No. 322301 III

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

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HARMONY WHITE

Appellant,

vs.

MOSES LAKE SCHOOL DISTRICT

Respondent,

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BRIEF OF RESPONDENT

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**A. ASSIGNMENTS OF ERROR**

THE TRIAL COURT ERRED IN GRANTING SUMMARY  
JUDGMENT DISMISSAL OF MS. WHITE'S LAWSUIT

ISSUES RELATED THERETO:

1. DID THE DISTRICT OWE MS. WHITE A DUTY?
2. IS THERE ANY EVIDENCE THAT THE ALLEGED  
BREACH OF DUTY CAUSED MS. WHITE TO FALL?

**B. STATEMENT OF THE CASE**

Plaintiff alleges she was injured on May 24, 2008, after slipping on a public sidewalk in front of Defendant's property. (CP 3-6) Ms. White was across the street from an elementary school in Moses Lake preparing for an evening parade. (CP 4) Ms. White ran across the street to use a porta-potty that was on the sidewalk adjacent to the school property. (CP 23-24) She was in a hurry because the parade officials had announced that the participants were to lineup. (CP 24) As she ran across the street and got to the sidewalk she stepped over the curb to the sidewalk and her foot slipped and she fell forward. (CP 22-23) She did not see what slipped on prior to the fall or after. (Id.) She described what she slipped on as gravel. (Id.) She is not certain exactly where she fell. (Id.)

The sidewalk in front of the school was where buses would park to let students off and pick students up after school. (CP 59) The school principal views the sidewalk daily and was not aware of any defects at the time of the fall. (CP 108) Although buses hit the curb with their tires, this is a rare occurrence and there is no documented or noticeable damage to the sidewalk from this infrequent occurrence. (CP 130-132)

In 2006 the district hired a contractor to correct any potentially uneven spots in the sidewalks near and around the schools. (CP 133-136)

This appeal follows dismissal of Appellant's claim pursuant to Respondent's motion for summary judgment. (CP 138-139)

## **C. ARGUMENT**

### **1. STANDARD OF REVIEW**

The District does not dispute Appellant's statement on standard of review.

### **2. THE COURT DID NOT SPECIFICALLY FIND THAT THAT THE DISTRICT OWED A SPECIAL DUTY TO MS. WHITE DUE TO A SPECIAL USE AND THE DISTRICT DID NOT EMPLOY A "SPECIAL USE" OF THE SIDEWALK**

In the Court's order granting the summary judgment motion there is no finding that the District employed a "special use" of the sidewalk. The issue is not really discussed as the Court focused on the clear lack of evidence concerning any damage caused by the District. There is an issue however, as to whether the District employed a "special use" of the sidewalk.

To establish a common law negligence claim, a party must establish four elements: (1) the existence of a duty ...; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash.2d 217, 220, 802 P.2d 1360 (1991). In the case at bar, the alleged "duty" is that an adjacent landowner, if using a sidewalk for its own special purpose, must use reasonable care for the safety of pedestrians. *Seiber v. Poulsbo Marine Center, Inc.*, 136 WA.App. 731, 738. The facts show that students and others used the sidewalk for access to the school. Cases dealing with this issue all speak of a landowner using the sidewalk for a purpose other than merely to walk upon. Which is why the word "special" is used in conjunction with "use." For instance, in the *Seiber* case, a merchant displayed wares on a boardwalk. In *Stone v. City of Seattle*, 64 Wn.2d 166, 391 P.2d 179 (1964) an apartment owner

was liable when tenants put a hole in the sidewalk by driving over it to reach their parking spots; in *James v. Burchett*, 15 Wn.2d 119, 126-27, 129 P.2d 790 (1942) the defendant was liable for allowing gravel from its car lot to be carried onto the sidewalk. The dealer knew his gravel spread to the sidewalk due to his usage because he had an employee sweep the sidewalk each day. Driving on a sidewalk is a special use. The same line of cases also uses this language:

*However, when that person uses a sidewalk for his own special purposes, he has a corresponding duty to maintain the walk in a reasonably safe condition for its usual and customary pedestrian usage.*

*Seibler v. Poulsbo Marine Center, Inc.*, 136 Wn.App 731, 738, citing *Hoffstatter v. City of Seattle*, 105 Wn.App. 596, 601-02, 20 P.3d 1003 (2001). The term “special use” is used to signify a use different than the “usual and customary pedestrian usage.” In *Edmonds v. Pacific Fruit and Produce Co.*, 171 Wn. 590, 18 P.2d 507 (1933) the defendant's heavy trucks damaged the sidewalk by using it as a driveway; and in *Groves v. City of Tacoma*, 55 Wn.App 330, 777 P.2d 566 (1989) the defendant's business invitees damaged the sidewalk by driving over it. In each of these cases, the respective defendants were liable for a pedestrian's injuries

because their special use of the sidewalk caused dangerous conditions to form. In the case at bar, it is unclear that the district even used the sidewalk for a “special use.” Sidewalks are for pedestrians. No different than homeowners, visitors or any other member of the public using a sidewalk for walking upon. In the case at bar, the district parked buses adjacent to the sidewalks so the students could use them in the “usual and customary” way – as pedestrians. It is not clear at all that a “special use” was employed.

3. THE COURT CORRECTLY DETERMINED THAT THERE WAS NO EVIDENCE OF ANY DAMAGE TO THE SIDEWALK CAUSED BY A SPECIAL USE OF THE SIDEWALK

Plaintiff’s theory is that buses bumping the sidewalk caused damage. (CP 138) Plaintiff speculates that because the district used the sidewalk for students to get off and on buses, there is a question of fact as to the district’s liability. Conclusory statements of fact will not suffice to defeat a motion for summary judgment. *Seiber v. Poulsbo Marine Center, Inc.*, 136 WA.App. 731, 740, 150 P.3d 633 (Div. 2 2007). Also, when the circumstances lend equal support to inconsistent conclusions or are equally consistent with contradictory hypotheses, the evidence will not be held sufficient to establish the asserted fact. *Lamphier v. Skagit Corp*, 6 Wn.App,

350, 357, 493 P.2d 1018 (1972). In this case, plaintiff's theory is speculative at best and it is just as likely, if not much more so, that natural erosion, or other causes led to whatever caused plaintiff to slip.

Despite the bus theory urged at the summary judgment hearing, Appellant has raised a number of misleading facts and issues in the opening brief that should be discussed. Ms. White cites a list of "evidence" delineated with bullet points (Appellant's brief p. 21-22) and then states "These admissible facts,...support the existence of genuine issues of material fact..." The problem is that almost every bullet point is out of context, irrelevant and/or misleading. Ms. White wants the court to make the jump from the fact that a bus occasionally hits a curb, to proximate cause of her fall. This theory is void of substance.

The Deposition excerpts quoted by Plaintiff do not provide any information as to whether a duty existed or what was the cause of Plaintiff's fall. First, there is a quote on page 5 of Appellant's brief from Mr. Hendricks concerning his concern that kids could trip. However, he was referring to when students are walking in crowds on "icy" sidewalks in the winter. (CP 61) The "trip" in question occurred in May and there is no evidence or reasonable inference

that snow had anything to do with the fall. The quotation is completely out of context. Next, Mr. Hendricks is quoted as acknowledging that the sidewalk in issue is used for school purposes. (CP 68) This is true, however, it is also used by the public for purposes that have nothing to do with the school, and there is no evidence that any alleged damage to the sidewalk had any genesis with school functions as opposed to a public use root – or, a natural, i.e., erosion related beginning. Also, “special” purposes is the key issue, not just purposes.

Mr. Hendricks is then quoted as stating something to the effect that “maybe now the school will clean up the sidewalk.”<sup>1</sup> (Appellant’s brief p. 7; CP 84) This statement does not lend credence to the plaintiff’s theory. Clean what up? Where, on what part of the sidewalk? It doesn’t suggest that the district was the cause of anything that might need to be “cleaned up.” In fact, Mr. Hendricks also stated that when he heard of Plaintiff’s fall he thinks he would have asked someone to look and see if there was a problem. (CP 63-64) Further, although Mr. Hendricks did say he wouldn’t deny making a statement like that, as asserted by plaintiff, however, he added that “it would be extremely unlikely” that he

would have made such a statement at that time. (CP 63-64) The proffered “hearsay” statement amounts to nothing. He also stated that he is on the sidewalk daily, looks for accumulations of sand or gravel, would notice them, he hates walking on gravel and if he noticed it he would call maintenance to fix the problem. (CP 59-60, 63-64) As stated above, he didn’t recall seeing or hearing of such a problem.

It is clear when you look at the statements made by Mr. Hendricks and his concerns about the sidewalk he was referring to winter conditions and sand being left on the sidewalk. He was trying to recall at deposition issues he had experienced in the past. (CP 60-64) However, sand was not used the year in question and neither sand nor ice was the culprit according to Ms. White. (CP 26-27) This series of statements are misleading and not related to the alleged bus damaged curb, which is Ms. Whites theory of liability.

On page 8-9 Mr. Hendricks is again quoted as saying the pictures he was shown looked “approximately” the same as they appeared at the time of the fall, but he added that he didn’t think they were as bad a few years earlier. The same quote series, and

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<sup>1</sup> The quote is from Ms. Chadwick, a secretary, and she wasn’t exactly certain

further quotes, also mention Mr. Hendricks talking about his complaints about the uneven areas of the sidewalk. This is very misleading because his complaints were addressed and in 2006 the district surveyed their sidewalks and hired a contractor to level off uneven areas, and any potential problem areas were fixed. (CP 133-136) Hence, Ms. White's fall occurred after the district paid to have the sidewalks surveyed and made safe. It is also true that Ms. White states she did not trip over an uneven sidewalk – she slipped on loose gravel.

Appellant's theory is that buses hitting the curbs caused the damage that led to the condition causing Ms. White to fall. Appellant quotes from Mr. Eschenbacher, who is in charge of the District's buses for the proposition that a bus might hit the curb occasionally. However, Mr. Eschenbacher is quite clear that it is not a common occurrence. He said that it "rarely" happens, that drivers are written up for it and that they can tell if it happens because the tire would be scuffed. Also, he added that the school in question has never been a problem in this area. There are a couple other schools with tight turn-arounds, where the issue usually would arise (CP 130-132)

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what Mr. Hendrick's exact words were.

There is no evidence of any District knowledge of an occasional tire bump causing a problem, or any evidence linking a tire bump to damage to a sidewalk or curb. “Where causation is based upon circumstantial evidence, the factual determination may not rest upon speculation...” In matters of proof the existence of facts may not be inferred from mere possibilities. *Wilson v. Northern Pacific R. Co.*, 44 Wn.2d 122, 128, 265 P.2d 815 (1954).

Appellant’s theory is pure speculation.

#### **D. CONCLUSION**

Buses drop off and pick up elementary school students adjacent to the sidewalk in question and occasionally their tires hit the curb. However, there is no indication that this has caused any damage to the sidewalk. Plaintiff stated in deposition that she slipped on “gravel.” There are no facts linking “gravel” to any actions of the school in having buses park next to the sidewalk and occasionally bump into it. It is pure speculation on the part of the plaintiff. As stated above, in summary judgment motions, a nonmoving party may not rely upon speculation and must come forward with specific facts. See, *Niece v. Elmview Group Home*, 79 Wn.App. 660, 668, 904 P.2d 784 (Div. 3, 1995) and *Meyer v.*

*University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). The sidewalk in question is a public sidewalk that can be accessed by any member of the public at any time. There are simply no facts linking any alleged defect in the sidewalk to any use of the school.

RESPECTFULLY SUBMITTED June 20, 2014.

JERRY MOBERG & ASSOCIATES, PS

A handwritten signature in black ink, appearing to read 'BAC', is written over a horizontal line.

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