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COA No. 372367

(Spokane County Superior Court Case No. 19-2-01167-32)

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

Angelina DeMaine and Paige Vigus,
Plaintiffs/Appellants,

vs.

First American Title Insurance Company and 40 Main, LLC
Defendants/Respondents

APPELLANTS' REPLY BRIEF

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I.

SUPPLEMENTAL STATEMENT OF ISSUES

- A.** Whether the trial court erred by dismissing 40 Main, LLC (“40 Main”), and First American Title Insurance Company (“First American”) from the action pursuant to CR 12(c) and 12(h)(2).
- B.** Whether 40 Main, as the owner of the property abutting the planting strip along 40 East Main Avenue, owed a duty of care to pedestrians such as DeMaine to warn of or repair the broken concrete utility cover that was located there.
- C.** Whether First American, as the tenant of the property abutting the planting strip along 40 East Main Avenue, owed a duty of care to pedestrians such as DeMaine to warn or repair the broken concrete utility cover that was located there.

II.

ARGUMENT

This is a case involving a planting (or parking) strip along 40 Main Avenue that was, as of March 19, 2016, watered by a sprinkler system featuring three green in-ground sprinkler boxes and lids along with a concrete utility cover with a missing broken-off chunk that only partially concealed a hard-to-see hole. (CP 11) The sprinkler system and its components were not natural conditions within the planting strip because

all of it had to be planned, excavated, constructed, and installed by somebody. It was a structure erected upon the land—a non-natural or artificial condition. *See Rosengren v. City of Seattle*, 149 Wn.App. 565, 574, 205 P.3d 909 (2009). The failure to properly construct, maintain, and inspect this artificial condition so it would not be a hazard to pedestrians was the cause of DeMaine’s injuries. The parties who had a duty to ensure the artificial condition was properly constructed, maintained, and inspected so it would not be a hazard to pedestrians were 40 Main who owned the abutting land and First American who occupied the abutting land.

A. REQUIREMENTS FOR A DISMISSAL UNDER CR 12(c) AND 12(h)(2) WERE NOT MET.

Appellate review of this case is centered around the determination of whether DeMaine’s claims against 40 Main and First American were properly dismissed on the pleadings. *See P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 210–11, 289 P.3d 638 (2012); CR 12(c) and 12(h)(2). Dismissal under CR 12(c) and 12(h)(2) is appropriate “only if it is **beyond doubt** that the plaintiff cannot prove any set of facts to justify recovery” and, in making this determination, “a trial court must presume that the plaintiff’s allegations are true and may consider hypothetical facts that are not included in the record.” *Id.* at 210-211. (**Emphasis added.**) The

Merriam-Webster Dictionary defines the idiom “beyond doubt” as meaning “without question: definitely.”¹ In its decision, the trial court did not explain how 40 Main and First American, in their documents supporting their motions for dismissal, met the “beyond doubt” standard despite the presentation by the City of Spokane (“the City”) and DeMaine in their opposing memorandums and declarations of actual and hypothetical facts. (*See* CP 136-163; CP 169-189) (RP 51-53) Likewise, the Respondents 40 Main and First American do not go into detail discussing exactly how their motions for dismissal met the “beyond doubt” standard in their opposing briefs. Yet, it is critical for the proper analysis of this case.

To prove a negligence claim, a plaintiff must show the existence of a duty, a breach of that duty, and an injury (or injuries) proximately caused by the breach. *See MH v. Corporation of Catholic Archbishop of Seattle*, 162 Wn.App. 183, 190, 252 P.3d 914 (2011). Thus, the threshold determination in a negligence action is whether the defendants owe a duty of care to the plaintiff. *See id.* 40 Main and First American claim they, as an abutting property owner and abutting property tenant respectively,

¹ “Beyond doubt.” *Merriam-Webster.com Dictionary*. Merriam-Webster, <https://www.merriam-webster.com/dictionary/beyond%20doubt>. Accessed 11 Sep. 2020.

owed no such duty of care to DeMaine and that the dismissal of her complaint under CR 12(c) and 12(h)(2) was proper because there were allegedly no actual or hypothetical facts supporting any allegation that they did. However, this argument does not hold up once the “beyond doubt” standard is applied and the submitted facts (both actual and hypothetical) are considered.

B. AN ABUTTING LANDOWNER (OR TENANT) CAN OWE A DUTY OF CARE TO A PEDESTRIAN IN A CITY-OWNED PLANTING STRIP.

1. Law in Washington On the Subject.

The court in *Coulson v. Huntsman Packaging Products Inc.*, 121 Wn.App. 941, 92 P.3d 278 (2004) implied abutting landowners (or tenants) can be held liable for injuries in a city-owned planting strip if they do anything that constitutes an exercise of control over the area.² See *id.* at 948. However, since the landowner in the case did not do this, there was no solid rule established in the State of Washington that can be applied here. The best that can be said is the *Coulson* decision opened the

² The relevant passage states:
[W]hat is missing here is any conduct by [the defendant] Pliant that manifested its intent to control the planting strip to the detriment or exclusion of the City of Kent or any member of the public; that is, conduct that would make it fair and reasonable to hold Pliant liable. *Coulson v. Huntsman Packaging Products Inc.*, 121 Wn.App. 941, 948, 92 P.3d 278 (2004).

door a bit to allow for such liability if the right factual scenario occurred (e.g., this one).

2. California Case of *Alcaraz v. Vece*.

While there are no other reported cases in the State of Washington with a fact pattern analogous to this one, there is one in California: *Alcaraz v. Vece*, 929 P.2d 1239, 60 Cal.Rptr.2d 448 (Cal.,1997)³. Here, the plaintiff, Gilardo C. Alcaraz, was injured when he stepped into a water meter box with a broken or missing cover located in the lawn in front of the rental property where he was a tenant. *Id.* at 1240. He sued his defendant landlords only to have his claim dismissed by the superior court on the landlords' motion for summary judgment because the meter box was not located on their property but instead on an abutting strip of land owned by the city that ran between the sidewalk and the landlords' property line. *Id.* at 1241. Alcaraz appealed the decision to the Court of Appeals who reversed it. The matter was then taken up by the California Supreme Court who agreed with the appellate court's holding that: (1) issue remained as to whether landlords exercised control over the city's strip and thus had a duty to warn the tenant of, or protect him from, hazard in question; (2) whether landlords derived commercial benefit from the

³ A copy of the case is attached in the Appendices.

portion of property that caused the injury was not determinative of liability; and (3) evidence that landlords maintained city-owned strip, and that landlords constructed a fence around the entire lawn, including that strip, after the tenant was injured, was relevant to issue of whether landlords exercised control over that strip. *Id.* at 1239. In support, the court explained:

Accordingly, in the present case, if the condition of the meter box created a dangerous condition on land that was in defendants' possession or control, defendants owed a duty to take reasonable measures to protect persons on the land from that danger, whether or not defendants owned, or exercised control over, the meter box itself. In other words, if the presence of the broken meter box made it dangerous to walk across land in defendants' possession or control, defendants had a duty to place a warning or barrier near the box to protect persons on the land from that danger.

Id. at 1243.

More significantly, the court in *Alcaraz* went on to conclude, “A defendant need not own, possess *and* control property in order to be held liable; control alone is sufficient.” *Id.* at 1247. Given these circumstances, the court determined a landowner could be held liable for injuries to a pedestrian occurring on an abutting piece of property owned by a city.

3. Applying *Alcaraz*: Control and Artificial Condition

In the present action, control over the planting strip was exercised by way of the excavation and construction of the sprinkler

system. It was also exercised by way of the repair of the sprinkler system and concrete utility cover done after DeMaine's accident that removed the hazards from the artificial condition.⁴ (CP 182-183) Nonetheless, 40 Main states, "Further, the alleged installation of the sprinkler system ... was for the purpose of maintaining the grass and vegetation of the planting strip, maintenance that is insufficient to establish a duty." *Brief of Respondent 40 Main, LLC*, pages 14-15. 40 Main, however, has no factual or legal basis to their claim that the installation of a sprinkler system is just maintenance and does not constitute construction of an artificial condition and control over the property. The court in *Rosengren* declared, "[A] structure erected upon land is a non-natural or artificial condition ... and changes in the surface by excavation or filling, irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of

⁴ See Letter by John DeLeo to Lloyd A. Herman, dated October 21, 2019. CP 182-183. The relevant portion states:

Upon arriving at the site on October 1st [2019], it was readily apparent the site had been altered from the conditions presented in the photographs [dating from 2016]. The changes included removing or burying the broken irrigation valve boxes (two) that had been crushed by the large tree roots; the soils were regraded to eliminate the larger surficial discontinuities (depressions and ridges) around the tree roots and crushed valve boxes; and, the cracked concrete lid had been moved to cover the hole in to the irrigation vault. The concrete cover is approximately 3-ft in diameter (approximately 2-1/2-inches thick) and only a portion of the lid cracked off from the main lid which led to the exposure hole into the interior of the vault. However, another crack traversed across the top of the lid near the center diameter.

natural forces.” 149 Wn.App. at 574. Constructing and installing a sprinkler system upon a patch of land requires “changes in the surface by excavation or filling” and thus constitutes “a non-natural or artificial condition.” *See id.* This fact is so apparent that it was tacitly supported by courts in the California cases of *Edler v. Sepulveda Park Apartments*, 297 P.2d 508, 141 Cal.App.2d 675 (1956), and the aforementioned *Alcaraz* along with the Iowa case of *Guzman v. Des Moines Hotel Partners, L.P.*, 489 N.W.2d 7 (Iowa 1992).⁵ All of these cases involved sprinkler systems and in each of them, the sprinkler systems were considered artificial conditions without any disagreement expressed by any of the parties.

4. **Since 40 Main and First American Could Be Held Liable as An Abutting Landowner and Tenant, They Could Not Be Dismissed Under CR 12(c) and 12(h)(2).**

Regarding who was responsible for the sprinkler and irrigation system and liable for causing DeMaine’s injuries, the First Amended Complaint was filed with the belief the planting strip where the accident occurred was owned and/or under the apparent control of at least three entities: the City, First American, and 40 Main. (CP 44-50) As of November 1, 2019, the day the trial court granted 40 Main’s and First American’s motions for dismissal under CR 12(c) and 12(h)(2), the City

⁵ *Edler* and *Guzman* are attached in the Appendices along with *Alcaraz*.

had filed documentary evidence indicating it did not own and install the irrigation and sprinkler system, its concrete utility cover, and box with the green lid; it did not irrigate or maintain the land where the concrete cover was located; and, it had no knowledge of the dangerous condition caused by the broken concrete lid before the accident. (CP 136-163) The City also concluded in its memorandum opposing the motions for dismissal, “As landowner and tenant, respectively, 40 Main and First American were in the best position to observe and remedy the alleged dangerous condition presented.” (CP 138) 40 Main and First American responded by merely denying DeMaine’s allegations in their Answers (and, in the case of First American, their interrogatory responses). (CP 60; CP 67-68) Staying strictly within the bounds of CR 12(c) and 12(h)(2), they did not submit any outside evidence countering DeMaine’s claims and instead stated that, as an abutting property owner and tenant, they had no duty to pedestrians injured in the City-owned planting strip. DeMaine had sent 40 Main a set of interrogatories and requests for production of documents that included a series of questions about the extent of 40 Main’s involvement, control, and knowledge of the sprinkler and irrigation system installed in the planting strip, but they were not answered since 40 Main was dismissed before they were due.

40 Main questions the inclusion in of some the unanswered interrogatories they received from DeMaine in the Appellants' Brief. *Respondent 40 Main's Brief* at 16. One reason for this was to show the existence of facts that at least hypothetically indicated 40 Main and First American owed and breached a duty to pedestrians like DeMaine. The discovery deadline of June 22, 2020, had not expired so it was still within DeMaine's right to send out interrogatories to find out the extent of 40 Main's (and their tenant First American's) involvement in the construction of the irrigation and sprinkler system and the extent of their responsibility and control over the planting strip. By granting the CR 12(c) and 12(h)(2) motions for dismissal, the trial court prematurely ended DeMaine's right to discover evidence pertaining to the 40 Main and First American thereby violating the spirit of the Washington State Supreme Court's holding in *Barnum v. State*, 72 Wn.2d 928, 435 P.2d 678 (1967), which declared full discovery proceedings will be afforded in all instances where factual inquiries are in order. *See id.* at 931.

C. *HOFFSTATTER* INAPPLICABLE TO FACTS OF THIS CASE.

Both 40 Main and First American heavily rely on the Court's decision in *Hoffstatter v. City of Seattle*, 105 Wn.App. 596, 20 P.3d 1003 (2001), to support their argument they owed no duty to DeMaine but the

factual differences between it and the present case render it mostly inapplicable. *Hoffstatter* involved an uneven brick surface in a planting strip rather than the above-ground components of an irrigation and sprinkler system that included a concrete utility cover with a broken-off piece and hole that was invisible to pedestrians. *See id.* at 600-601. The abutting property owners and occupiers in *Hoffstatter* did not create an artificial dangerous condition as opposed to the present case where the dangerous condition (*i.e.*, the broken concrete utility cover and hole) stemmed from the construction and installation of an irrigation sprinkler system in the planting strip by the Respondents. This is something that definitely constitutes more than “occasional maintenance.”

D. DEMAINE SUFFICIENTLY DESCRIBED CAUSE OF ACTION AND CLAIMS AGAINST 40 MAIN AND FIRST AMERICAN.

40 Main and First American partially based on their motions for dismissal on the alleged deficiencies of DeMaine’s pleadings when describing their special use or exclusive control as abutting property owners/occupiers over the City’s planting strip. *See Respondent 40 Main’s Brief* at pg. 12 and *Brief of Respondent First American Title Insurance Company*, pgs. 9-16. Yet, this represents the imposition of an unrealistic standard that requires a plaintiff to have complete knowledge of the facts of a case at the beginning. All facts supporting a claim do not have to be

set forth in the complaint. *Bryant v. Joseph Tree, Inc.*, 57 Wn.App. 107, 118, 791 P.2d 537 (1990). A complaint should apprise the defendant of what the plaintiff's claim is—and the legal grounds upon which it rests—and should not be dismissed unless it appears beyond doubt that proof of no set of facts would entitle the plaintiff to relief. *Christensen v. Swedish Hospital*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962). A claim is adequately pleaded if it contains a short, plain statement showing that the pleader is entitled to relief, and a demand for judgment based thereon. *Schoening v. Grays Harbor Community Hosp.*, 40 Wn.App. 331, 337, 698 P.2d 593 (1985). In this case, it was not necessary for the DeMaine to plead all the facts “constituting a cause of action.” *See id.* Even if DeMaine’s theory was not made clear in the pleadings, it was made clear in the arguments presented in the memorandum opposing 40 Main’s and First American’s motions for dismissal under CR 12(c) and 12(h)(2). *See id.*

E. TRIAL COURT’S DECISION ON CONTINUANCE MOTION AND DISCOVERY.

40 Main and First American state the issues pertaining to the denial of DeMaine’s discovery and the motion to continue the CR 12(c) and 12(h)(2) hearing date were not properly appealed in that they were raised more than 30 days after the trial court’s decision on October 25, 2019. It should be noted that at the time the continuance motion was

denied on October 25th, it had no effect on when and if DeMaine would receive answers to the interrogatories and requests for production she sent to 40 Main. It was not until 40 Main was dismissed along with First American on November 1, 2019—six days before the November 7th date the interrogatory answers were due—that DeMaine’s discovery rights were adversely affected. Thus, the 30-day deadline to appeal that issue set forth in RAP 5.2(a) should relate back to November 1st rather than October 25th. In any case, the goal is not so much to get the trial court’s denial of the motion to continue reversed but to show that because there were still issues in dispute and discovery to be done, the trial court erred by granting the dismissal motions on November 1st.

III.

CONCLUSION

The trial court erred and abused its discretion by granting First American’s and 40 Main’s motions for dismissal under CR 12(c) and 12(h)(2) on November 1, 2019. Its decision did not meet the rule’s requirement that such motions are appropriate only if it is **beyond doubt** that the plaintiff cannot prove any set of facts to justify recovery. for dismissal and was premature. 40 Main and First American mistakenly believe it is not possible for them, as an abutting landowner and an abutting tenant, to held liable for the injuries DeMaine suffered in the

City-owned planting strip in this case. The law indicates this is possible as do the facts surrounding the installation and construction of the irrigation and sprinkler system with the broken concrete utility cover. DeMaine and her daughter, Paige Vigus, again respectfully request the Court to reverse and remand the trial court's decision.

RESPECTFULLY SUBMITTED this 25th day of September 2020.

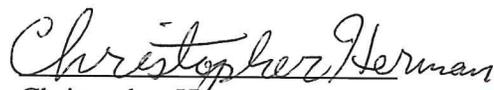
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of September 20 20
 I caused to be served a true and correct copy of the foregoing by the
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