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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

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Angelina DeMaine and Paige Vigus,  
Plaintiffs/Appellants,

vs.

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

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BRIEF OF APPELLANTS ANGELINA DEMAINE AND PAIGE VIGUS

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Lloyd A. Herman, WSBA #3245  
Christopher Herman, WSBA #22610  
Lloyd A. Herman & Associates, P.S.  
213 N. University Rd.  
Spokane Valley, WA 99206  
(509) 922-6600 (phone)  
(509) 922-4720 (fax)  
[LloydHerm@aol.com](mailto:LloydHerm@aol.com)  
Attorneys for Plaintiffs/Appellants

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**I.**

**ASSIGNMENTS OF ERROR**

**A.** The trial court erred and abused its discretion by granting the Respondents' Motions to Dismiss under CR 12(c) and 12(h)(2).

**B.** The trial court erred and abused its discretion by denying Appellants' CR 56(f) motion for continuance of the hearing date for the Respondents' joint Motions to Dismiss under CR 12(c) and 12(h)(2).

**II.**

**ISSUES PERTAINING TO  
ASSIGNMENTS OF ERROR**

**A.** Whether the trial court erred and abused its discretion by granting the Respondents' Motions to Dismiss under CR 12(c) and 12(h)(2). (Assignment of Error I.A.)

**B.** Whether the trial court erred and abused its discretion by denying Appellants' CR 56(f) motion for continuance of the hearing date for the Respondents' joint Motions to Dismiss under CR 12(c) and 12(h)(2). (Assignment of Error I.B.)

**III.**

**STATEMENT OF THE CASE**

The Respondent, 40 Main, LLC (hereinafter “40 Main”), owns the property located at 40 East Spokane Falls Boulevard in downtown Spokane, Washington. On the property is a building occupied by Respondent, First American Title Insurance Company (hereinafter “First American”). The south end of this building faces 40 Main Avenue where a sidewalk, planting strip, and parking places are located. This abutting area is under the control of 40 Main and First American along with the City of Spokane (hereinafter “the City”).

Before March 19, 2016, First American and/or 40 Main (or their predecessors in interest) planned, installed, and began maintaining the planting strip between the street and the sidewalk along 40 East Main Avenue at the south end of building located at 40 East Spokane Falls Boulevard. First American and/or 40 Main installed a sprinkler system in the planting strip along with a manhole with a concrete cover and three green in-ground sprinkler boxes with lids. The area around the sprinkler boxes and concrete manhole cover became compressed by tree roots causing the lids not to fit on the sprinkler boxes. The manhole with cover and the sprinkler boxes with cover were part of the planting strip’s sprinkler system. The manhole’s concrete cover was heavy and a piece of it had broken off leaving a hole.

On Saturday, March 19, 2016, the Appellant, Angelina DeMaine (hereinafter “DeMaine”) parked her motor vehicle in a City parking space along 40 East Main Avenue adjacent to the south end of the building owned and occupied by 40 Main and First American. The parking place was by a meter just beyond a big tree. DeMaine had to return to her automobile to get her things out so she walked down the sidewalk and diagonally crossed the grassy area of the planting strip. As she walked across the strip, she saw a green sprinkler box and the manhole cover. However, it was dark outside and there were no outside lights on the back side of First American Title Company. DeMaine stepped over the green sprinkler box and thought she was clearing the manhole cover because it was dark and there were no outside lights. However, she did not know a large piece of the manhole cover had broken off and stepped into and got her right foot stuck in a hole. (CP 11) Her forward motion continued forward with her right foot stuck causing a break followed by her falling and spraining her ankle.

Examination of the accident scene by DeMaine’ expert in June 2016 revealed there were at least three green above-ground sprinkler boxes and a concrete manhole cover in the planting strip between the street and the sidewalk. (CP 118) The hole had formed in the area around the sprinkler boxes and concrete manhole cover. During later examination of

the scene on October 1, 2019 by DeMaine' expert, John DeLeo, it was discovered the sprinkler boxes had been buried underground and the hole covered. (CP 181-183) Exactly who did this and when it was done (as well as who was originally responsible for installing, inspecting, and maintaining the sprinkler boxes and concrete manhole cover) has not been determined.

On June 7, 2017, DeMaine filed a Claim for Damages with the City as required by RCW 4.96 et seq. (CP 10-13) The City rejected the claim.

On March 13, 2019, DeMaine and her minor daughter, Paige Vigus, filed suit against First American, the City, James A. and "Jane Doe" Wolff, and a "John Doe" Company. (CP 1-13) A subsequent Amended Summons and Complaint filed on July 1, 2019 dropped the Wolffs and the "John Doe" Company as defendants and replaced them with 40 Main. (CP 42-50). The new case schedule was issued stating the deadline to file amended pleadings or join parties in this case was December 20, 2019, the discovery cut-off was June 22, 2020, and the trial was set to begin on August 24, 2020.

On May 21, 2019, DeMaine served their First Set of Interrogatories and Requests for Production of Documents on First American who answered and returned them on June 24, 2019. Among the questions DeMaine asked First American were to identify any employee, manager,

supervisor, or agent “who would be responsible for supervision of maintenance of the sidewalk and parking area for your branch office at 40 East Spokane Falls Boulevard.” First American objected to the interrogatories as “overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence” and said “they had no duty to maintain or care” for the parking strip where DeMaine’s accident occurred and the extent of their care and maintenance of the area was limited to “occasionally sweeping leaves from the steps on the south side of building.” Also, First American stated they had “no knowledge of the individuals or companies that designed and installed the sidewalk and parking area.”

On September 9, 2019, First American filed a Motion to Dismiss on grounds of failure to state a claim under which relief could be granted pursuant to CR 12(c) and 12(h)(2)<sup>1</sup>. (CP 73-79) 40 Main joined the

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<sup>1</sup> The relevant sections of CR 12 state as follows:

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

...

(h) Waiver or Preservation of Certain Defenses ...

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a

dismissal motion on October 2, 2019 and a hearing for the motion was set for November 1, 2019. (CP 88-97) The deadline for DeMaine to respond was October 21, 2019.

DeMaine served 40 Main with their First Set of Interrogatories and Requests for Production of Documents on October 7, 2019. The set (which was not due until November 7<sup>th</sup>) included a series of interrogatories asking 40 Main to identify the people who would have been “responsible for the maintenance and care of the sidewalk, planting strip, and parking area located along 40 East Main Street (i.e., the south end of the building located at 40 East Spokane Falls Boulevard) ... at the time of the incident (i.e., March 19, 2016).” There were also these interrogatories:

INTERROGATORY NO. 16: Please identify and explain all reasonable policies and procedures, inspections, security plans and procedures or methods of operations implemented by the company and managers to safeguard the public from dangerous conditions upon the premises, including but not limited to sidewalks and parking areas.

...

INTERROGATORY NO. 17: Did you have any procedures, regulations or policies for regular inspection of the sidewalk, planting strip, and parking area located along 40 East Main Street (i.e., the south end of the building located at 40 East Spokane Falls Boulevard) at the time of

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legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

the occurrence in question? If so, please describe.

...

INTERROGATORY NO. 18: Please describe any claims or lawsuits that have heretofore been brought against you by reason of an accident or injury at the same or similar location, or a similar type of accident on your premises or at some other locations.

...

INTERROGATORY NO. 19: What efforts were made by you to correct the condition or defect (which Plaintiff contends caused the occurrence in question) prior to the accident in question?

...

INTERROGATORY NO. 20: What efforts were made by you to correct the condition or defect which the Plaintiff contends caused the occurrence after the accident in question?

...

INTERROGATORY NO. 21: If you corrected, repaired or fixed in any way the defect or condition which Plaintiff alleges to have been the cause of the accident in question, please state what the cost of repair was, the date the repairs were done, and the name, address and telephone number of the person or firm carrying out such repair work.

...

INTERROGATORY NO. 22: Please state the name, address, and telephone number of the individual(s) or company(ies) that designed and installed the sidewalk, planting strip, and parking area located along 40 East Main Street (i.e., the south end of the building located at 40 East Spokane Falls Boulevard).

...

INTERROGATORY NO. 39: Do you have a lease or rental agreement with the Defendant First American Title Insurance Company? If so, please state as follows:

- a. The terms of the agreement;
- b. Whether the agreement mentions who is responsible for the supervision, maintenance, and care of the sidewalk, planting strip, and parking area located along 40 East Main Street (i.e., the south end of the building located at 40 East Spokane Falls Boulevard); and
- c. How liability would be apportioned in case anyone was injured on the sidewalk, planting strip, and parking area located along 40 East Main Street (i.e., the south end of the building located at 40 East Spokane Falls Boulevard).

...

INTERROGATORY NO. 40: On the south end of the building located at 40 East Spokane Falls Boulevard along 40 East Main Street, there is an adjacent planting strip between the sidewalk and the parking places in the street. On March 19, 2016, were you responsible for the landscaping, inspection, maintenance, upkeep, and irrigation of this property?

...

INTERROGATORY NO. 41: In the planting strip mentioned in the previous interrogatory, there were at least three green above-ground sprinkler boxes in a hole at the scene of the Plaintiff's accident on March 19, 2016. (See attached photo #1 for reference.) Between that date and October 1, 2019, they were buried underground and the

hole filled in. (See attached photo #2 for reference.)  
Please provide information as to:

- a. Whether you were responsible for installing the green above-ground sprinkler boxes (and, if not, who was);
- b. What date they were installed;
- c. Whether you inspected, maintained, and repaired the area (and, if not, who did);
- d. Whether you replaced/buried underground the sprinkler boxes (and, if not, who did);
- e. What date the sprinkler boxes were replaced/buried underground;
- f. Whether you filled in the hole (and, if not, who did); and
- g. On what date the hole was filled in.

Another set of interrogatories and requests for production of documents asking similar questions was sent to the City on October 8, 2019. DeMaine also began setting up deposition dates for representatives of 40 Main, First American, and the City.

On October 10, 2019, DeMaine filed dual motions for leave to file a second amended complaint with more precise facts about the accident and to have the hearing for First American and 40 Main's CR 12(c) and 12(h)(2) motions for dismissal be continued under CR 56(f) from November 1, 2019 to a later date.<sup>2</sup> (CP 98-124) DeMaine requested the

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<sup>2</sup> CR 56(f) states:

Should it appear from the affidavits of a party opposing the motion that, for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for

continuance so 40 Main and the City would have at least 30 days to complete their interrogatories and requests for production of documents and depositions of the Respondents could be scheduled. (CP 114) The trial court heard the motion on October 25, 2019 and granted the second motion to amend but denied the motion to continue. (RP 3-17; CP 198-200)

On October 18, 2019, the City filed a consolidated response opposing the Respondents' motion to dismiss. (CP 136-163) In its memorandum and supporting declarations, it denied owning and installing the concrete cover that covered components of an irrigation system. (CP 138; CP 159) The City also denied owning and installing the box with the green lid. (CP 138; CP 159) The City went on to state that it did not irrigate or maintain the land where the concrete cover was located and had no knowledge of the broken lid or its alleged dangerous condition. (CP 138; CP 159-160) The City concluded, "While the Motions to Dismiss are silent on the topic, presumably either First American or 40 Main installed the irrigation system, including the concrete cover" and as "and tenant, respectively, 40 Main and First American were in the best position to observe and remedy the alleged dangerous condition presented." (CP 138; CP 159-160)

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judgment or 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.

On November 1, 2019, the trial court heard and granted 40 Main and First American's joint motion to dismiss. (RP 18-54; CP 209-212) The parties immediately cancelled their deposition plans. 40 Main never answered and returned DeMaine's First Set of Interrogatories and Requests for Production of Documents.

DeMaine settled their claim against the City and dismissed them from the suit on November 26, 2019. (CP 216-219) DeMaine filed their Notice of Appeal on November 27, 2019. (CP 220-225)

#### IV.

#### **SUMMARY OF ARGUMENT**

The trial court committed reversible error by failing to take the facts alleged in DeMaine's complaints, as well as hypothetical facts, in the light most favorable to her as required in a motion for dismissal under CR 12(c) and 12(h)(2).

The trial court erred by failing to address the duty imposed on abutting landowner 40 Main and abutting tenant First American by their creation of the artificial condition (i.e., the sprinkler system with the concrete manhole cover and three green in-ground sprinkler boxes) in the planting strip and their roles in constructing it, failing to properly maintain and fix it, and resulting liability for causing DeMaine's injuries.

The trial court erred by denying DeMaine's motion to continue the hearing date for the 40 Main's and First American's motion for dismissal under CR 12(c) and 12(h)(2) until after some more discovery had taken place between the parties.

DeMaine respectfully requests that this court reverse the trial court's decision and either grant judgment in favor of her and her daughter, Paige Vigus, or remand this case back to Spokane County Superior Court.

V.

**ARGUMENT**

**A. REVIEW: APPEAL OF CR 12(c) AND 12(h)(2) DISMISSAL**

When a trial court's dismissal of a claim under CR 12(c) and 12(h)(2) is appealed, the standard of review is de novo. *P.E. Systems, L.L.C. v. C.P.I. Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). The appellate court must examine the pleadings to determine whether the plaintiff can prove any set of facts, consistent with the complaint that would entitle the plaintiff to relief. *Parrilla v. King County*, 138 Wn.App. 427, 431–32, 157 P.3d 879 (2007). The factual allegations contained in the complaint are accepted as true. *Id.*

**B. TRIAL COURT ERRED BY GRANTING FIRST AMERICAN'S AND 40 MAIN'S MOTIONS FOR DISMISSAL**

1. **Rule of Negligence**

Proving negligence means the plaintiff must establish (1) there was a duty owed to her by the defendant, (2) the duty was breached by the defendant, (3) injury resulted, and (4) proximate cause. *Wilson v. City of Seattle*, 146 Wn.App. 737, 741, 194 P.3d 997 (2008). The existence of a duty is a question of law and was the basis of First American's and 40 Main's Motions for Dismissal under CR 12(c) and 12(h)(2). *See id.*

2. **What Is Required for a Motion for Dismissal Under CR 12(c) and 12(h)(2).**

Parties attempting to dismiss pleadings under CR 12(c) and 12(h)(2) must pass over a high threshold of legal requirements. A motion to dismiss under CR 12(c) should be granted "sparingly and with care," and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). The courts may only dismiss a complaint under CR 12(c) if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery. *Howell v. Department of Social and Health Services*, 7 Wn.App.2d 899, 910, 436 P.3d 368 (2019). Dismissals under CR 12(c) are appropriate only if "it appears beyond doubt that the plaintiff

can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). In undertaking such an analysis, the “plaintiff’s allegations are presumed to be true and a court may consider hypothetical facts not included in the record.” *Tenore*, 136 Wn.2d at 330. Accordingly, the court must take the facts alleged in the complaint, as well as hypothetical facts, in the light most favorable to the nonmoving party. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 122–23, 11 P.3d 726 (2000). A hypothetical situation conceivably raised by the complaint defeats a CR 12 motion “if it is legally sufficient to support plaintiff’s claim.” *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

3. **Trial Court Failed to Realize First American’s and 40 Main’s Motions Did Not Meet Rule’s Requirements**

The trial court granted First American’s and 40 Main’s CR 12(c) and 12(h)(2) motions for dismissal without subjecting them to the factual and legal analysis stated above. There is a conspicuous failure by the trial court to consider the facts stated in the complaints and hypothetical facts in a light most favorable to DeMaine. The primary example of this occurred with the trial court’s unquestioned acceptance of First American’s and 40 Main’s citation of *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217,

802 P.2d 1360 (1991), to support their claims they had no duty to prevent injury to anyone using sidewalks, planting strips, and parking lots and other plots land adjacent to theirs. (CP 92-94) The trial court should have realized the Respondents' reliance on this authority was misplaced since the State Supreme Court's decision in *Hutchins* was based on a unique situation far removed from fact pattern in the present action.<sup>3</sup> Furthermore, *Hutchins* still recognized when possessors of land create artificial conditions, they have a duty to construct and maintain them in a way that does not create an unreasonable risk of harm to those using the public way. *See id* at 222-223. Subsequent cases have extended this rule to abutting landowners, so they too have the duty to exercise reasonable care to ensure the artificial condition does not pose an unreasonable risk of harm to pedestrians using public rights-of-way like planting strips. *See Rosengren v. City of Seattle*, 149 Wn.App. 565, 575, 205 P.3d 909 (2009); *See id* at 222. Likewise, abutting property owners making special use of the public way must not create or contribute to a condition or defect in a way that renders it unsafe for use by pedestrians. *See Rivett v. City of Tacoma*, 123 Wn.App. 573, 579, 870 P.2d 299 (1994). An abutting property owner who breaches these duties is liable for any subsequent pedestrian injuries that

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<sup>3</sup> In *Hutchins*, the plaintiff was a pedestrian who had been pushed by muggers into a building's dark unlit entryway so he could be assaulted and robbed.

result. See *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn.App. 731, 739, 150 P.3d 633 (2007).<sup>4</sup> This applies to all public right-of-ways be they sidewalks or planting strips like where DeMaine was hurt. See, e.g., Spokane Municipal Code (SMC) 12.02.948 (which, prior to being amended, defined “right-of-way” to include “that strip of land (A) dedicated for public travel, including the main traveled portions of the streets and sidewalks as well as parking or *planting strips* ... or which is built, public streets, sidewalks or alleys for public travel”) (*Emphasis added*). In similar circumstances, tenants of property owners can also be held liable for negligently creating dangerous conditions or contributing to a defect that harms the public. See *Daggett v. Tiffany*, 2 Wn.App. 309 (1970).

The trial court further erred when it cited *Coulson v. Huntsman Packaging Prod. Inc.*, 121 Wn.App. 941, 92 P.3d 278 (2004), to support its decision. (RP 52) This case involved a motorist who was injured in a motor vehicle accident because an overgrown and unpruned tree in a

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<sup>4</sup> *Seiber* also listed the following cases where the defendant abutting property owner was held liable for a pedestrian’s injuries on a sidewalk: *Stone v. City of Seattle*, 64 Wn.2d 166, 391 P.2d 179 (1964) (apartment owner liable when tenants put a hole in the sidewalk by driving over it to reach their parking spots); *James v. Burchett*, 15 Wn.2d 119, 126–27, 129 P.2d 790 (1942) (defendant was liable for allowing gravel from its car lot to be carried onto the sidewalk); *Edmonds v. Pac. Fruit & Produce Co.*, 171 Wn. 590, 590–91, 18 P.2d 507 (1933) (defendant’s heavy trucks damaged the sidewalk by using it as a driveway); *Groves v. City of Tacoma*, 55 Wn.App. 330, 777 P.2d 566 (1989) (defendant’s business invitees damaged the sidewalk by driving over it).

planting strip obstructed his view of an intersection. The motorist argued the adjacent business owner owed a duty to maintain the trees in a City of Kent planting strip. Division I of the Court of Appeals disagreed and held the adjacent landowner owed no duty to keep the *natural* condition on the land of another "from posing an unreasonable risk of harm to a traveler using the adjacent intersection." *Id.* at 948. However, the trial court failed to address the part of *Coulson* where the Court signaled its decision would have been different had the condition been artificial as opposed to natural. *Id.* Here, of course, the condition in question – the broken concrete manhole cover -- is artificial. The trial court also did not discuss this fact in relation to the artificial condition, 40 Main's and First American's possible roles in creating it, their failure to properly maintain it, and how they are liable for causing DeMaine's injuries.

4. **40 Main and First American Had a Duty to DeMaine  
But Breached It**

The planting strip along 40 East Main Street where the Appellant DeMaine was injured is a public right-of-way since people have to regularly cross it to reach the sidewalk after they parked their cars in the street. The abutting property owner 40 Main and the abutting property possessor First American have a collective duty to maintain the planting strip in a reasonably safe condition for pedestrian use. *See Seiber*, 136

Wn.App. at 738. That duty arises with instances of special use of the planting strip by 40 Main and First American since it was a foreseeable pedestrian pathway that people would use to get from the parking stalls to the sidewalk. (CP 184-189) More significantly, this duty also arises if 40 Main and First American created any artificial conditions in the planting strip. In this case, the artificial condition was the installation and maintenance of the sprinkler system that included the above-ground sprinkler boxes, broken concrete manhole cover, and hole which DeMaine fell into. Even if 40 Main and First American were not responsible for negligently creating the artificial condition in the planting strip, they were responsible for negligently maintaining it and share liability for causing DeMaine's injuries. Unlike their co-defendant, the City of Spokane, 40 Main and First American did not submit any facts indicating they were not involved in the construction and maintenance of the sprinkler system and manhole cover in the planting strip along 40 West Main Avenue. They instead exclusively relied on the assertions put forth in the pleadings. It is improper to resolve factual issues in a motion for judgment on the pleadings. *Barnum v. State*, 72 Wash.2d 928, 931, 435 P.2d 678, 680 (1967). Unfortunately, by granting 40 Main's and First American's joint motions for dismissal under CR 12(c) and 12(h)(2), that is exactly what the trial court did here.

**C. TRIAL COURT ERRED BY DENYING CONTINUANCE MOTION**

The trial court prematurely granted 40 Main's and First American's joint motions for dismissal. 40 Main had been served with interrogatories and requests for production of documents on October 7, 2019 and had at least 30 days to complete them. Also, the parties were in the middle of scheduling depositions. The problem was DeMaine's responding documents were due on October 21, 2019 and the hearing was on November 1, 2019. This is why DeMaine moved for a continuance of the hearing date on the motions for dismissal under CR 56(f) only to be denied by the trial court. However, this decision constituted a serious error.

A ruling on the motion for a continuance is within the discretion of the trial court and is reversible by an appellate court only for a manifest abuse of discretion. *Coggle v. Snow*, 56 Wn.App. 499, 504, 784 P.2d 554 (1990). The proper standard for determining this is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion. *See id* at 507. With these principles in mind, the consideration of whether a trial court properly exercised its discretion begins with looking at CR 56(f) which states that where affidavit of the party opposing the motion shows reasons why the

party cannot present facts justifying its opposition in time for the proceeding, the court may order a continuance in order for depositions to be taken or discovery to be had. *See id.* “(T)he court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case.” *Id.* at 507. This rule is further supported by CR 1 which says, “These rules govern the procedure in the superior court in all suits of a civil nature” and “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” The procedural rules under our present practice are to be liberally construed in order that full discovery proceedings will be afforded in all instances where factual inquiries are in order. *Barnum*, 72 Wn.2d at 931.

The primary consideration in the trial court's decision on DeMaine's motion for a continuance should have been justice. *See Coggle*, 56 Wn.App. at 508. The court should have viewed the motion in the context of the existing case schedule which stated the deadline to file amended pleadings or join parties in this case was December 20, 2019, the discovery cut-off was June 22, 2020, and the trial was set to begin on August 24, 2020. Justice is not served by a draconian application of time limitations. *See id.* DeMaine's interrogatories and requests for production of documents to 40 Main had not been finished and returned and more discovery had yet to be done. Granting a continuance would have been

more beneficial to the process than granting a dismissal. *See id.* At no point did 40 Main or First American claim they would have suffered prejudice if the continuance had been granted. There was no tenable ground or reason for the trial court's decision. It constituted an improper exercise of discretion.

## VI

### 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). Its decision did not meet the rule's threshold for dismissal and was premature. Also, the trial erred and abused its discretion by denying DeMaine's motion to continue the hearing date for these motions. DeMaine and daughter, Paige Vigus, respectfully request the Court to reverse and remand the trial court's decisions.

RESPECTFULLY SUBMITTED this 22nd day of June 2020.

LLOYD A. HERMAN & ASSOCIATES, P.S.



LLOYD A. HERMAN

WSBA # 3245

Attorney for Appellants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22<sup>nd</sup> day of June 2020,  
I caused to be served a true and correct copy of the foregoing by the  
method indicated below and addressed to the following:

Steve Stocker Scott G. Boyce Bohrnsen, Stocker, Smith, Luciani, Adamson PLLC 312 W. Sprague Ave. Spokane, WA 99201 (509) 327-2500 (ph) (509) 327-3504 (fax) Counsel for Respondent/Defendant, 40 Main, LLC	<input type="checkbox"/> PERSONAL SERVICE <input type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> TELECOPY (FAX) <input checked="" type="checkbox"/> EMAIL <a href="mailto:sboyce@bssslawfirm.com">sboyce@bssslawfirm.com</a>
Laurie Lootens Chyz Jessica C. Carr Hillis, Clark, Martin & Peterson, P.S. 999 Third Ave., Ste. 4600 Seattle, WA 98104 (206) 623-1745 (ph) (206) 623-7789 (fax) Counsel for Respondent/Defendant, First American Title Insurance Company	<input type="checkbox"/> PERSONAL SERVICE <input type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> TELECOPY (FAX) <input checked="" type="checkbox"/> EMAIL <a href="mailto:Laurie.Chyz@hcmp.com">Laurie.Chyz@hcmp.com</a>

  
Christopher Herman

**LLOYD A HERMAN & ASSOCIATES**

**June 22, 2020 - 11:58 AM**

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