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**COURT OF APPEALS, DIVISION III  
OF THE 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 RESPONDENT  
FIRST AMERICAN TITLE INSURANCE COMPANY**

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## I. INTRODUCTION

Plaintiff Angelina DeMaine<sup>1</sup> claims she was injured from tripping over a manhole cover when crossing between a city-owned sidewalk and a city-owned parking area. She sued the City of Spokane for negligence, along with the respective owner (40 Main, LLC) and occupant (First American Title Insurance Company) of a building nearby.

Washington law provides that an owner or occupant of property near a public way is not an “insurer of public safety,” and generally owes no duty toward pedestrians nearby. First American and 40 Main moved for dismissal on the pleadings under Civil Rule 12(c) for DeMaine’s failure to state a claim against them. The trial court properly granted dismissal because the pleadings fail to allege that First American or 40 Main meet any of the few exceptions to the well-established rule that adjacent property owners and occupants owe no duty toward pedestrians on public walkways. The trial court also properly denied a motion for a continuance that DeMaine had previously requested, and now attempts to appeal, despite failing to properly designate the issue on appeal. This Court should affirm.

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<sup>1</sup> Plaintiffs/appellants are collectively referred to as “DeMaine” throughout this brief. When referencing alleged actions or injuries of Angelina DeMaine specifically, this brief refers to “Ms. DeMaine.”

## **II. STATEMENT OF THE CASE**

### **A. Factual Background**

This case arises from injuries that Ms. DeMaine allegedly sustained when she tripped on a broken manhole cover on the City of Spokane's property.<sup>2</sup> CP at 46-47. According to the Amended Complaint, the incident occurred after Ms. DeMaine parked her vehicle "in a City parking space with a City parking meter located behind the building at 40 East Spokane Falls Boulevard." CP at 46. The building itself is owned by 40 Main, LLC ("40 Main") and occupied by First American Title Insurance Company ("First American"). *Id.* The Amended Complaint alleges that the areas "outside the building"—including the "sidewalk and parking areas"—are "under the control of the defendant City of Spokane." *Id.*

Ms. DeMaine claims she was injured while returning to her vehicle parked in the City parking space behind the building. CP at 46. According to the Amended Complaint, the alleged injury occurred when Ms. DeMaine "walked down the City sidewalk and crossed the grassy area diagonally." *Id.* Ms. DeMaine noticed a manhole cover and tried to walk

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<sup>2</sup> As described further below, factual allegations are drawn from the operative version of DeMaine's complaint, CP at 44-50 (First Amended Complaint).

by it to the left side, but she apparently stepped into a hole on or near the manhole cover with her right foot, fell, and hurt her ankle. CP at 46-47.

### **B. Procedural History**

Nearly three years after the accident, DeMaine sued the City of Spokane (which owned and controlled the property where Ms. DeMaine was injured), along with the respective owner and occupant of a building nearby—40 Main<sup>3</sup> and First American—for negligence. CP at 47-48. Ms. DeMaine’s daughter also brought a claim for loss of consortium. CP at 48. The parties stipulated to an Amended Complaint so DeMaine could substitute the defendant identified as the owner of the building, and make additional corrections, in July 2019. CP at 51-57 (Stipulated Order to Amend Complaint), 44-50 (Amended Complaint). Both 40 Main and First American answered the Amended Complaint. CP at 58-64, 65-70.

After the pleadings were closed between First American and DeMaine, First American filed a Motion to Dismiss pursuant to Civil Rules 12(c) and 12(h)(2) for DeMaine’s failure to state a claim against First American. CP at 73-79. More specifically, First American’s Motion to Dismiss explained that First American did not owe any duty to prevent the injuries that DeMaine allegedly sustained from tripping over a

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<sup>3</sup> DeMaine initially named a different defendant as the owner, but later amended her complaint to replace 40 Main as the owner of the building. CP at 51-57.

manhole cover on property that the City of Spokane controlled. CP at 74. First American's Motion to Dismiss was originally noted for a hearing on October 4, 2019. Sub No. 23.<sup>4</sup> Following an agreement of the parties, the Motion to Dismiss was re-noted for November 1, 2019. Sub Nos. 25, 27, 31. 40 Main joined First American's Motion to Dismiss, arguing that it (as owner of the building that First American occupied) similarly owed no duty to prevent DeMaine's alleged injuries. CP at 88-97.

While First American's and 40 Main's Motions to Dismiss were pending, DeMaine filed a Second Motion for Leave to Amend Complaint and Motion to Continue Hearing Date for Defendants' Motions for Dismissal. CP at 98-112. DeMaine's requested relief was twofold: 1) that the trial court permit DeMaine to amend the complaint for a second time, and 2) that the trial court further continue the hearing on Defendants' Motions to Dismiss—which had already been rescheduled to the following month—so DeMaine could have additional time to conduct discovery. *Id.* Following a hearing on October 25, the trial court granted the former, and denied the latter. CP at 198-200. Despite receiving permission to amend

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<sup>4</sup> First American has requested a supplemental designation of clerk's papers to include additional materials filed with the trial court. These materials have not yet received clerk's papers numbering, and will be referred to instead with the trial court's sub numbering.

the complaint for a second time, DeMaine never filed or served the proposed Second Amended Complaint.

In November 2019, the trial court held a hearing on First American's and 40 Main's Motions to Dismiss. CP at 212. After hearing argument from the parties, the trial court granted the Motions and dismissed First American and 40 Main from the lawsuit. CP at 209-211.

The remaining defendant in the lawsuit, the City of Spokane, had not moved for dismissal. DeMaine apparently settled all claims against the City and dismissed it from the lawsuit with prejudice on November 26, 2019. CP at 216-19; *see also* DeMaine's Br. at 11. DeMaine's Notice of Appeal followed, identifying a single trial court order for appeal: "Order on [Defendant First American Title Insurance Company's and Defendant 40 Main's] Joint Motion for Dismissal." CP at 220.

### **III. ISSUES PERTAINING TO DEMAINÉ'S ASSIGNMENTS OF ERROR**

1. Whether the trial court properly dismissed DeMaine's claims against First American under Civil Rule 12 because First American owed no duty to prevent the alleged injuries that Ms. DeMaine sustained from tripping on property that First American did not own, specially use, or exclusively control?

2. Whether DeMaine's appeal of the trial court's denial of a continuance should be dismissed as improperly before this Court, or because trial court did not abuse its discretion in denying a continuance when DeMaine failed to provide legal authority warranting the continuance, and had already obtained appropriate relief?

#### **IV. SUMMARY OF ARGUMENT**

The trial court properly granted First American's Motion to Dismiss under Civil Rule 12(c) because First American did not have a duty to prevent injuries that DeMaine allegedly sustained on the City's property. Even construing the allegations in the light most favorable to DeMaine, the operative version of DeMaine's complaint fails to allege a viable legal duty applicable to First American. It is well established that property owners and occupants do not owe a duty to pedestrians merely based on their proximity to neighboring property or rights-of-ways, and DeMaine fails to allege any of the few exceptions to this rule.

On appeal, DeMaine now seeks to introduce further details and allegations that are inconsistent with the operative complaint—and therefore cannot be considered in the context of a Civil Rule 12 motion—and, in any event, still fail to establish any duty applicable to First

American. This Court should therefore affirm dismissal for failure to state a claim.

The trial court also properly denied DeMaine's request for a continuance on the Motions to Dismiss. In claiming more time was needed for discovery, DeMaine seems to confuse the standard for a Civil Rule 12 motion to dismiss—which determines the sufficiency of allegations in the pleadings—with a Civil Rule 56 motion for summary judgment—which relies on facts and evidence that can be obtained through discovery. The court below did not abuse its discretion in denying a continuance under Civil Rule 56(f) in the context of a Civil Rule 12 motion to dismiss—particularly in light of the trial court's simultaneous decision permitting DeMaine leave to file another amended complaint.

## **V. ARGUMENT**

This Court should affirm First American's Motion to Dismiss pursuant to Civil Rules 12(c) and 12(h)(2) because First American did not have a duty to prevent DeMaine's injuries on the City's property. Civil Rule 12(c) permits a party to move for dismissal for failure to state a claim by a motion for "judgment on the pleadings," which can be made any time after pleadings are closed between the parties (so long as trial is not delayed). CR 12(c), 12(h)(2). Like a motion for failure to state a claim under Civil Rule 12(b)(6), courts considering a motion for judgment on

the pleadings review the pleadings to “determine if a plaintiff can prove any set of facts that would justify relief.” *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). While this inquiry construes allegations in the light most favorable to the non-moving party and can consider hypothetical facts, such hypotheticals must be “consistent with the complaint” in order to defeat a motion to dismiss. *N. Coast Enters., Inc. v. Factoria P’ship*, 94 Wn. App. 855, 859, 974 P.2d 1257 (1999). The trial court’s ruling on a motion to dismiss is reviewed de novo. *Id.* at 858.

Although DeMaine did not properly appeal the second claimed error, if this issue is considered, the Court should also affirm the trial court’s denial of DeMaine’s motion to continue. The trial court did not manifestly abuse its discretion in denying DeMaine’s request for a continuance to conduct additional discovery (under Civil Rule 56(f)) in the context of a motion to dismiss under Civil Rule 12—especially when DeMaine simultaneously received leave to file another amended complaint. *See In re Welfare of N.M.*, 184 Wn. App. 665, 673, 346 P.3d 762 (2014) (decisions denying continuances are reviewed for “manifest abuse of discretion”). Additionally, DeMaine’s purported reason for requesting the continuance—so another defendant could complete discovery responses—does not apply to First American, who DeMaine claims had already answered discovery.

**A. DeMaine fails to state a claim against First American because First American, as a tenant occupying a building near the area where DeMaine allegedly fell, had no duty to prevent DeMaine’s alleged injuries**

This Court should affirm the trial court’s dismissal as to First American because First American did not owe—or violate—any duty to prevent the injuries that Ms. DeMaine allegedly sustained on City property. In order to assert a negligence claim against First American, DeMaine must show: 1) First American owed her a duty; 2) First American breached that duty; 3) DeMaine was injured; and 4) First American’s breach was the proximate cause of the injuries. *See Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). Even construed in the light most favorable to DeMaine, the pleadings fail to allege that First American—as tenant in a building near the outdoor parking area or planting strip where Ms. DeMaine allegedly fell—could have owed or breached any legal duty toward DeMaine.

**1. The operative complaint fails to allege a viable legal duty when First American did not own, specially use, or control the area of alleged injury**

***a. A property owner or occupant near a public walkway is not “an insurer of pedestrian safety”***

DeMaine seeks to hold 40 Main and First American liable for negligence based on injuries she allegedly sustained on City property, but

fails to allege any legal duty owed by the respective neighboring property owner and occupant. Although Washington landowners and occupants owe varying duties of care to individuals who are injured on their *own* property, these same duties do not necessarily extend to pedestrians on nearby property. *See Hutchins*, 116 Wn.2d at 221-22.

Washington law has long established that a person or entity “in control of property abutting a public sidewalk is not an insurer of pedestrian safety.” *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 738, 150 P.3d 633 (2007); *see also Stone v. City of Seattle*, 64 Wn.2d 166, 170, 391 P.2d 179 (1964) (“An abutting owner is not an insurer of pedestrians”) (citing cases dating back to 1933). Instead, that person owes a duty toward pedestrians who use neighboring walkways only in certain limited circumstances, which are not present here.

***b. First American did not engage in any “special use” that would give rise to a duty***

Although abutting property owners and occupants do not have a general duty to ensure the safety of pedestrians nearby, Washington law recognizes a limited exception in some circumstances when the neighboring owner or occupant has made “special use” of a public way. However, no such duty applies here.

The special use exception can arise when a property owner or occupant uses a public sidewalk or walkway “for his own special purposes.” *Seiber*, 136 Wn. App. at 738. For instance, *Seiber* recognized a store owner’s use of a boardwalk to display merchandise outside its store as a “special use,” which gave rise to a duty to keep the area immediately surrounding the display reasonably safe for pedestrians.<sup>5</sup> *Id.* at 739. Similarly, display of furniture in an area between a street and a sidewalk near a parking strip can constitute “special use.” *See Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 602, 20 P.3d 1003 (2001).<sup>6</sup>

Here, there is no allegation that First American uses the areas outside its building for its own purposes in any manner, let alone a special manner that would give rise to a duty to affirmatively maintain its safety for passersby. The only factual allegations in the entirety of the Amended

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<sup>5</sup> *Seiber* also cites to a series of cases in which a defendant’s special use of a sidewalk by repeatedly driving over it caused a hole or defect to develop. *Seiber*, 136 Wn. App. at 739. There are no similar allegations here.

<sup>6</sup> DeMaine also cites to *Rivett v. City of Tacoma*, but this case is distinguishable. *See* DeMaine’s Br. at 15. *Rivett* addresses a private property owner’s *statutory*, rather than common law, duty to maintain an abutting city sidewalk in a reasonably safe condition. *Rivett v. City of Tacoma*, 123 Wn.2d 573, 870 P.2d 299 (1994) (citing former Tacoma Municipal Code 9.17.010, .020). Moreover, that case held that the city ordinance that purported to impose such a duty was unconstitutional, as it violated substantive due process under the State Constitution. *Id.* at 581-83. In contrast, the city code applicable to the jurisdiction in *this* lawsuit expressly provides that the provisions governing private use of public ways do *not* create any enforceable duty to particular persons. *See* Spokane Municipal Code Sections 12.01.005 (effective as of August 4, 2007) (in the section describing the purpose of Title 12, relating to “Public Ways and Property,” stating that “no specific duty to particular persons is created hereby”), 12.02.005 (effective as of August 4, 2007) (same for chapter on “Obstruction, Encroachment of Public Ways”). These Spokane Municipal Code provisions are included in the appendix to this brief.

Complaint relating to First American state that First American “is a California corporation doing business in the State of Washington,” and that it occupies a building near the sidewalk and parking area where Ms. DeMaine was allegedly injured. CP at 45 (¶ 1.3), 46 (¶ 3.2). There is no allegation that First American—which operates a title insurance company—engaged in *any* sort of “special use” of the area outside the building it occupied. Without a basis to even infer any sort of special use, the pleadings fail to allege a duty applicable to First American.

*c. First American did not create any allegedly dangerous condition that would give rise to a duty*

DeMaine attempts to claim a possessor of land who “create[s] artificial conditions” has 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.” DeMaine’s Br. at 15. But this duty is neither as broad as DeMaine asserts, nor applicable to these circumstances.

Again, the Amended Complaint fails to plead any facts about First American creating *any* sort of condition—whether natural or artificial, unreasonably dangerous or otherwise. CP at 45-50. There is no basis in the pleadings to infer First American created a condition that would give rise to a legal duty as alleged by DeMaine.

In addition to the lack of applicable factual allegations, the legal authority on which DeMaine relies is distinguishable. DeMaine claims she was injured by, and seeks to hold First American liable for, a purportedly dangerous condition (broken manhole cover) that existed on a parking area or planting strip on *City* property. In contrast, the cases cited by DeMaine address a landowner's or occupant's duty to ensure certain conditions *on its own land* do not pose an unreasonable risk of danger to passersby on adjacent land. *See* DeMaine's Br. at 15. For instance, *Rosengren v. City of Seattle* addressed tree roots from a private neighbor's property that extended underneath a nearby public sidewalk, creating an allegedly dangerous condition by uplifting the sidewalk. 149 Wn. App. 565, 570, 205 P.3d 909 (2009). Additionally, the *Hutchins* Court determined no duty existed in that case, but recognized others in which a defendant may owe a "duty of reasonable care to prevent *activities* and *conditions* on his land from injuring persons or property outside his land." *Hutchins*, 116 Wn.2d at 223 (quotation and citations omitted) (finding defendants had no duty to a passerby plaintiff when the "[d]efendants did not themselves engage in some activity or business on the premises which posed a direct danger to passersby or others off the premises"). As examples, *Hutchins* cites cases in which activities and conditions *on the defendant's land* caused harm to individuals passing by on a public way, such as a window shade that fell

from an upper story of a building and struck a customer waiting below (*Poth v. Dexter Horton Estate*, 140 Wash. 272, 248 P. 374 (1926)); oil that spilled from a service station onto a sidewalk where the plaintiff slipped and fell (*Collais v. Buck & Bowers Oil Co.*, 175 Wash. 263, 27 P.2d 118 (1933)); and a broken fence that allowed horses to escape from the defendant’s property, resulting in injury to plaintiffs driving by (*Misterek v. Wash. Mineral Prods., Inc.*, 85 Wn.2d 166, 531 P.2d 805 (1975)). *Hutchins*, 116 Wn.2d at 222-23; *see also Albin v. Nat’l Bank of Commerce*, 60 Wn.2d 745, 375 P.2d 487 (1962) (logging activities could have created the danger of a tree that fell from the defendant’s land onto a public highway, injuring a passing motorist).

Here, in contrast, the only purportedly dangerous condition described in the Amended Complaint—a broken manhole cover—existed on *City* property. The pleadings do not offer any basis to conclude that First American created any allegedly dangerous condition on its land that posed an unreasonable risk of harm to passersby like Ms. DeMaine.

***d. First American did not control the area of the alleged injury in a manner that would give rise to a duty***

Finally, although not supported by a single factual allegation related to First American, the Amended Complaint claims—in the section setting out DeMaine’s causes of action—that “defendants designed,

constructed, inspected, repaired, and maintained the sidewalk and parking area for the building located at 40 East Spokane Falls Boulevard in a negligent and careless manner.” CP at 47. Even if these conclusions are considered without supporting factual allegations,<sup>7</sup> they fail to allege any duty applicable to First American.

A private landowner’s maintenance activities on a public planting strip do not give rise to a common law duty unless the defendant so controls the planting strip that it effectively excludes the city or the public. See *Coulson v. Huntsman Packaging Prods. Inc.*, 121 Wn. App. 941, 948, 92 P.3d 278 (2004) (evidence that the “defendant engaged in regular and frequent maintenance of a planting strip over many years” was insufficient to impose a duty when there was no evidence that the defendant “manifested its intent to control the planting strip to the detriment or exclusion of the City of Kent or any member of the public”).

Based on DeMaine’s allegation that the areas where Ms. DeMaine was injured “are under the control of the defendant City of Spokane,” CP at 46, there is no basis to conclude that First American could have

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<sup>7</sup> In ruling on a motion pursuant to Civil Rule 12(c), the court does not “accept legal conclusions as correct, even when couched as facts in the complaint.” *Howell v. Dep’t of Soc. & Health Servs.*, 7 Wn. App. 2d 899, 910, 436 P.3d 368 (2019), as amended on denial of reconsideration (May 23, 2019).

exclusively controlled the area in a manner that would give rise to a duty to maintain safety of that location for passersby.

**2. Although not properly before this Court, DeMaine's proposed Second Amended Complaint also fails to allege breach of any legal duty**

On appeal, DeMaine now seeks to introduce further allegations that are inconsistent with the operative complaint. Although DeMaine fails to properly cite to the record, RAP 10.3(a)(5), it appears that some of these allegations may be drawn from DeMaine's proposed Second Amended Complaint.<sup>8</sup> While the Court should decline to consider these new allegations for the reasons described initially below, even if the new allegations are considered, DeMaine still fails to allege any legal duty applicable to First American.

***a. The Court should decline to consider DeMaine's proposed Second Amended Complaint***

The Court should decline to consider DeMaine's allegations on appeal that are inconsistent with the operative complaint, including allegations drawn from a proposed complaint that DeMaine never filed. Despite receiving leave allowing the proposed Second Amended

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<sup>8</sup> Other unsupported factual assertions in DeMaine's brief, including those related to the timing and content of discovery requests, appear nowhere in the record, in violation of RAP 10.3(a)(5).

Complaint, CP at 198-200, DeMaine inexplicably failed to file or serve a new version of the complaint following that order granting leave, and therefore forfeited the opportunity to rely on the proposed Second Amended Complaint. According to Civil Rule 15, “If a motion to amend is granted, the moving party *shall* thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties.” CR 15(a) (emphasis added). The rule expressly distinguishes between a proposed amended pleading—which shall be designated as proposed, attached to the motion to amend, and remain unsigned—with the effective version of an amended pleading, which *must* be filed and served on all parties in accordance with the Civil Rules after leave is granted. *Id.* DeMaine should not be permitted to rely on a proposed pleading that was never filed or served pursuant to Civil Rule 15(a) and Civil Rule 5.

***b. DeMaine’s additional allegations still fail to suggest breach of any duty potentially applicable to First American***

Even if the allegations in the proposed Second Amended Complaint are considered, DeMaine still fails to allege breach of any potentially applicable legal duty. The unfiled complaint mainly describes additional details about the location and circumstances surrounding Ms. DeMaine’s alleged injury. CP at 108-9. For instance, the proposed Second Amended Complaint states that a “planting strip” existed between

the street and the sidewalk, and describes a “sprinkler system” that included a “manhole with a concrete cover and three green in-ground sprinkler boxes with lids” within the planting strip. *Id.* The new allegations claim that the area outside the building—including the sidewalk, planting strip, and parking areas—“are under the control of the defendants 40 Main, LLC and First American along with defendant City of Spokane.” CP at 108. Although DeMaine claims “the defendants (or their predecessors) planned, installed, and began maintaining the planting strip” and installed the sprinkler system, *id.*, the complaint does *not* allege that any defendant was responsible for creating a dangerous condition in the area. Instead, DeMaine alleges that “tree roots” from trees planted in the planting strip “compressed” the surrounding area and caused the lids not to fit properly. CP at 109. Finally, DeMaine clarifies further details about her fall and alleged injuries. *Id.*

Even construed in the light most favorable to DeMaine, these additional allegations cannot defeat First American’s Motion to Dismiss. DeMaine still fails to plead any facts sufficient to support a breach of any of the potentially applicable legal duties discussed in Section V.A.1.

First, both versions of DeMaine’s complaints fail to allege any sort of “special use” that would give rise to a legal duty toward passersby. DeMaine’s brief incorrectly assumes that a “duty to maintain the planting

strip in a reasonably safe condition for pedestrian use” should apply merely based on 40 Main’s and First American’s status or proximity as “abutting property owner” and “abutting property possessor,” respectively. DeMaine’s Br. at 17-18. However, this interpretation defeats both the title and purpose of the “special *use*” exception, which requires a defendant to specifically *use* the planting strip or public way in such a manner to give rise to a legal duty. *See, e.g., Seiber*, 136 Wn. App. at 738 (“A person in control of property abutting a public sidewalk is not an insurer of pedestrian safety,” and must *use* the sidewalk “for his own special purposes” before a duty will arise).

Second, DeMaine still fails to suggest First American may have created any dangerous conditions or engaged in any activities *on its property* that risked harming pedestrians on the sidewalk or planting strip nearby. *See Hutchins*, 116 Wn.2d at 223 (no duty owed to passersby when the “[d]efendants did not themselves engage in some activity or business on the premises which posed a direct danger to passersby or others off the premises”).

Finally, DeMaine’s additional allegations relating to defendants’ purported installation or maintenance of the sprinkler system in the planting strip, CP at 108, fail to demonstrate any legal duty applicable to First American. According to *Coulson*, a neighboring defendant’s

maintenance of a planting strip must rise to the level of exclusive control before a court will impose a duty toward pedestrians in that area.

121 Wn. App. at 948.

There is no basis to infer, consistent with either version of the complaint, that First American could have exclusively controlled the area at issue. *See* CP at 46 (Amended Complaint: stating the areas “outside the building”—including the “sidewalk and parking areas”—are “under the control of the defendant City of Spokane”); 108 (proposed Second Amended Complaint: “The sidewalk, planting strip, and parking areas located outside the south end of this building are . . . under the control of the defendants 40 Main, LLC and First American *along with* defendant City of Spokane” (emphasis added)); *see also N. Coast Enters.*, 94 Wn. App. at 859 (hypothetical facts must be “consistent with the complaint” to be considered for purposes of a Civil Rule 12 motion).

Contrary to DeMaine’s assertion, the *Coulson* court did not signal that “its decision would have been different had the condition been artificial as opposed to natural.” DeMaine’s Br. at 17. Instead, the court simply stated it had “no cause to decide whether to adopt” a provision from the Restatement (Second) of Torts that considers a duty specifically related to trees near a highway. *Coulson*, 121 Wn. App. at 948 n.24. The *Coulson* decision does not contain the word “artificial,” and in fact cites to

a case involving occasional replacement of dislodged bricks as “analogous”—further undermining DeMaine’s claimed distinction between the purported duty to maintain natural versus artificial conditions. *Id.* at 945-46 (citing *Hoffstatter*, 105 Wn. App. 596). And even if such a distinction were considered, it would not make a difference here. DeMaine alleges that a *natural* condition—growth of nearby tree roots that compressed the area—was responsible for the allegedly dangerous condition at issue. *See* CP at 109.

In accordance with *Coulson* and related cases, DeMaine’s allegations that First American may have maintained or controlled the area of alleged injury are insufficient to allege a legal duty because the complaint does not plead *exclusive* control. Washington law is clear that a private neighbor’s control over or maintenance of city-owned property “does not constitute a special use giving rise to a duty of care” absent exclusive control—even when the neighbor is alleged to have controlled the area by replacing dislodged bricks or engaging in regular gardening activities (such as trimming trees, raking leaves, and gardening), and even when the maintenance activities occurred regularly and frequently for a period exceeding a decade. *See Hoffstatter*, 105 Wash. App. at 602 (citing *Contreras v. Anderson*, 59 Cal. App. 4th 188, 69 Cal. Rptr. 2d 69 (1997)); *Coulson*, 121 Wn. App. at 947-48. DeMaine’s complaint, even as she

proposed to amend it, fails to allege a duty applicable to First American without pleading *exclusive* use or control.

***c. DeMaine fails to allege any unreasonably dangerous condition in the parking strip***

Even if DeMaine could point to an applicable duty, that duty only extends to prevent conditions that could be considered “unreasonably dangerous”—which is not the case here. Although DeMaine relies on a number of cases involving potential duties to maintain *sidewalks*, her amended allegations clarify that Ms. DeMaine’s alleged injury occurred on a planting strip (also called a parking strip) between the City-owned sidewalk and street. CP at 108-109; *accord* CP at 46-47 (explaining Ms. DeMaine was crossing “the grassy area” past the City sidewalk when she fell). “What constitutes a reasonably safe condition on a parking strip is not the same as it is for a sidewalk because a sidewalk’s purpose is mainly pedestrian use, while a parking strip frequently contains utility poles and meters, fire hydrants, trees, grass, and other ornamentation.” *Wilson v. City of Seattle*, 146 Wn. App. 737, 741, 194 P.3d 997 (2008).

In cases addressing conditions in a parking strip nearly identical to those alleged here—such as bricks dislodged by tree roots, and manhole covers—courts have determined such conditions were not unreasonably dangerous as a matter of law because “pedestrians can be expected to pay

closer attention while crossing a landscaped parking strip than while walking on a sidewalk.” *See id.* at 741-42 (citing *Hoffstatter*, 105 Wn. App. at 600-601). Based on this analogous authority, DeMaine fails to allege any unreasonably dangerous condition that First American may have had a duty to prevent or correct.

Taken together, whether this Court considers allegations in the operative version of DeMaine’s complaint, or even the proposed Second Amended Complaint that was never properly filed or served, the result is the same: the pleadings fail to state any legal duty that could have applied to First American. The Court should affirm dismissal pursuant to Civil Rule 12(c).

**B. The trial court did not manifestly abuse its discretion in denying DeMaine’s requested continuance**

DeMaine did not properly appeal the second claimed error—denial of DeMaine’s requested continuance—but even if she had, additional relief is not warranted.

**1. DeMaine has not properly appealed this issue**

DeMaine claims the trial court erred in denying a motion to continue a hearing, but she has not properly appealed this issue. In addition to the procedural defects described by 40 Main, DeMaine failed to designate the order denying her motion for continuance in the notice of

appeal, CP at 220-25, in violation of RAP 2.4(a). This issue should not be considered on appeal.

**2. The trial court did not manifestly abuse its discretion**

Even if DeMaine had properly appealed this issue, she is not entitled to additional relief. DeMaine claims the trial court erred in denying DeMaine’s motion to continue the hearing date on First American’s and 40 Main’s Motions to Dismiss because one of the parties—*not* First American—had not yet responded to written discovery requests. DeMaine’s Br. at 19. In support, DeMaine cites to inapplicable legal authority— Civil Rule 56(f)—and attempts to introduce allegations about the timing and content of discovery requests that appear nowhere in the record, in violation of RAP 10.3(a)(5). *See* DeMaine’s Br. at 4-10, 19-21. But even if considered on appeal, the trial court did not manifestly abuse its discretion—meaning “no reasonable judge would have reached the same conclusion”—in denying DeMaine’s requested continuance. *See In re Welfare of N.M.*, 184 Wn. App. at 673 (quotation and citation omitted).

In requesting a continuance under Civil Rule 56(f) in response to First American’s motion to dismiss, DeMaine seems to confuse the standards between summary judgment under Civil Rule 56 and motions to

dismiss under Civil Rule 12. While summary judgment considers admissible evidence presented by the parties, and does not permit an opposing party to rely on “the mere allegations or denials of a pleading” in response to evidence presented, *see* Civil Rule 56(e), a motion to dismiss under Civil Rule 12 tests the sufficiency of allegations in the pleadings—regardless of evidentiary support. *See P.E. Sys., LLC*, 176 Wn.2d at 203. DeMaine’s citation to cases involving a party’s apparent need to conduct additional discovery or to have an opportunity to “complete the record” before the court rules on a summary judgment motion are therefore inapplicable. *See* DeMaine’s Br. at 19-20.<sup>9</sup>

In focusing on the denial of her requested continuance (and relying on the wrong standard), DeMaine fails to acknowledge that she simultaneously received a more appropriate form of relief from the trial court. While the trial court declined to continue the hearing on First American’s and 40 Main’s Motions to Dismiss, it simultaneously granted DeMaine an opportunity to amend her complaint again before that hearing. CP at 198-200. If there were any defects in the pleadings that

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<sup>9</sup> Even if the need for additional discovery could somehow support the requested continuance, and even if DeMaine could meet the high bar of demonstrating the trial court manifestly abused its discretion on this ground—both of which First American disputes—in any event, reversal would not be warranted as to First American. DeMaine claims that she was only waiting on 40 Main’s responses to discovery, DeMaine’s Br. at 19, and points out that First American had already answered and responded, *id.* at 4.

could have been cured before trial court ruled on the Motions to Dismiss, DeMaine had ample opportunity to do so. Over six months after the original complaint had been filed and after answering an amended version of the complaint, First American moved for dismissal on the pleadings. *See* CP at 1-13 (initial Summons and Complaint), 44-50 (Amended Complaint), 65-70 (First American's Answer to Amended Complaint), 73 (First American's Motion to Dismiss). 40 Main joined that motion on October 2, 2019 (CP at 88-89), and the parties agreed to continue the hearing date on the Motions to Dismiss for an additional month. *See* Sub Nos. 25, 27, 31. *After* having an opportunity to review First American's and 40 Main's arguments supporting dismissal, DeMaine requested—and ultimately received—leave to file a proposed Second Amended Complaint. CP at 98-112 (Plaintiffs' Second Motion for Leave to File Amended Complaint), 198-200 (Order on Motion to Amend and Extend). DeMaine was not entitled to any additional relief under these circumstances, and the trial court did not manifestly abuse its discretion.

## **VI. CONCLUSION**

Even construed in the light most favorable to DeMaine, the pleadings fail to allege any legal duty applicable to First American. First American had no duty to prevent injuries that DeMaine allegedly sustained on City property merely based on its status as a tenant in a

building nearby, and the pleadings fail to allege that First American owned, specially used, or exclusively controlled the area of alleged injury in a manner that could give rise to a legal duty. The trial court's decision granting First American's motion to dismiss on the pleadings pursuant to Civil Rule 12(c), and—if considered on appeal, denial of DeMaine's requested continuance—should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of July, 2020.

HILLIS CLARK MARTIN & PETERSON P.S.

By: Jeni Kerr  
Laurie Lootens Chyz, WSBA #14297  
Jessica C. Kerr, WSBA #49866  
Attorneys for Respondent First American Title  
Insurance Company

**CERTIFICATE OF SERVICE**

On the date indicated below, I hereby certify that I caused to be served upon all counsel of record, via email service and service through the Court of Appeals portal, a true and correct copy of the foregoing document.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of July, 2020, at Seattle, Washington.

s/Brenda K. Partridge  
Brenda K. Partridge

## **APPENDIX**

- A. Spokane Municipal Code Chapter 12.01 Section 12.01.005
- B. Spokane Municipal Code Chapter 12.02 Section 12.02.005

# **Appendix A**



# Spokane Municipal Code

[Home](#)

[Title 12](#)

[Chapter 12.01](#)

[Section 12.01.005](#)

[Title 12 Public Ways and Property](#)

[Chapter 12.01 Improvement, Maintenance of Public Ways](#)

[Section 12.01.005 Purpose](#)

The purpose of this title is to regulate and control the obstruction of public rights-of-way in the City so that those rights-of-way remain accessible and safe for their intended public use. No specific duty to particular persons is created hereby.

Date Passed: Monday, June 25, 2007

Effective Date: Saturday, August 4, 2007

Recodification ORD C34053 Section 1



## **Appendix B**



# Spokane Municipal Code

[Home](#)

[Title 12](#)

[Chapter 12.02](#)

[Section 12.02.005](#)

[Title 12 Public Ways and Property](#)

[Chapter 12.02 Obstruction, Encroachment of Public Ways](#)

[Section 12.02.005 Purpose](#)

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**HILLIS CLARK MARTIN & PETERSON P.S.**

**July 22, 2020 - 4:04 PM**

**Transmittal Information**

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