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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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**ANGELA DEMAINE and PAIGE VIGUS**

**Appellants,**

**v.**

**FIRST AMERICAN TITLE INSURANCE COMPANY,  
and 40 MAIN, LLC**

**Respondents.**

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**BRIEF OF RESPONDENT 40 MAIN, LLC**

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## I. INTRODUCTION

The appeal filed by Angela DeMaine and Paige Vigus (“Appellants”) requests this court to overturn the dismissal of Appellants’ suit without legal justification. Appellants had claimed that a trip-and-fall accident on a strip of property owned by the City of Spokane entitled them to relief as against Respondents because one or both of Respondents had “maintained” the strip of land. *See Appellants’ Brief*, generally. The motion to dismiss by 40 Main, LLC (“40 Main”) and First American Title Company (“First American”) (collectively, “Respondents”) came before Superior Court Judge Annette Plese via a motion to dismiss on the pleadings, pursuant to Court Rule 12(c) and 12(h)(2).

Judge Plese reasoned that based upon the case law presented and the second amended pleadings by Appellants, there existed no hypothetical facts that could entitle Appellants to relief as a matter of law. Appellants, having amended their pleadings twice without success, have now appealed and present no legal basis on which to overturn the trial court’s determination. As further evidence of the weakness of Appellants’ arguments, Appellants’ brief avoids citation to *Hoffstatter v. City of Seattle*, 105 Wash. App. 596, 20 P.3d 1003 (2001), which held that “neighborly maintenance” was not sufficient to create a duty of care on an abutting landowner. Appellants presumably omitted *Hoffstatter* because the holding

therein is clearly contrary to their argument that maintenance of the strip of land owned by the City of Spokane creates a duty of care upon Respondents. Appellants argue that the trial court's ruling was wrong, without any legal basis for such a conclusion. *See Appellants' Brief* at 16-17. Because Appellants have not cited any legal precedent supporting their position, 40 Main asks this court to affirm the trial court decision by Judge Plese.

## **II. ISSUES AND ASSIGNMENTS OF ERROR**

Appellants assign error to the trial court on two bases, (1) abuse of discretion by granting a motion to dismiss under CR 12(c) and CR 12(h)(2), and (2) abuse of discretion by denying a motion to continue Respondents' motion to dismiss on the pleadings. However, Appellants' notice of appeal only noted the first assignment of error; the notice of appeal was filed more than 30 days after the court had denied Appellants' motion to continue, and a motion to continue is not appealable as a matter of right. *See* RAP 5.2, 2.2, and 2.3, *see also infra* at 22-23. As a result, the only issue for this court to decide is:

**Whether the trial court abused its discretion in dismissing 40 Main and First American on the pleadings for claimed injuries sustained on the property abutting 40 Main's land, when the pleadings did not assert any facts that would support a finding of special use or exclusive control of said abutting property by 40 Main or First American?**

### **III. STATEMENT OF THE CASE**

Appellants' statement of the case provides some insight into the underlying suit, but omits important procedural issues and arguments that resulted in the dismissal of Appellants' complaint by the trial court. It is acknowledged, for purposes of the present appeal, that Appellant Angela DeMaine ("DeMaine") tripped on City of Spokane property adjacent to the building owned by 40 Main and occupied by 40 Main's tenant, First American, but the exact details of Appellants' fall or her claimed injuries are not essential to dismissal of Appellants' complaint. Appellants also discuss, at length, the discovery served in the underlying matter, which also has no bearing on Respondents' dismissal pursuant to CR 12(c) and CR 12(h)(2).

Appellants initially filed and served the complaint in April 2019, then amended the complaint to include 40 Main, LLC, in July 2019. CP 44, 51. 40 Main answered the first amended complaint and admitted the allegation by Appellants that "the sidewalk and parking areas outside the building are under the control of the defendant City of Spokane." *Id.* at 46, 59-60.

First American filed a motion to dismiss on the pleadings, pursuant to CR 12(c) on September 9, 2019, to which 40 Main joined on October 2,

2019. CP 73, 88. Hearing was set for November 1, 2019, but in the interim, Appellants filed for leave to amend their pleadings to “conform to evidence disclosed in discovery, factual statements made by the defendants, and clarify the facts regarding where exactly the accident...took place.” CP 98-99. Appellants also requested continuance of the November 1st hearing in an effort to secure additional discovery in the matter, citing to CR 56(f). CP 98-99. At the October 25, 2019 hearing on Appellants’ motion for leave to amend, Appellants argued for leave to amend and touched upon the issue of Respondents’ legal duty of care on abutting property, claiming that cases such as *Stone v. City of Seattle*, 64 Wn.2d 166, 391 P.2d 179 (1964), and the Restatement on Torts supported the existence of a duty of care. *See Report of Proceedings*, 4-5. 40 Main, joined by First American, argued that leave to amend was futile, because even Appellants’ proposed second amended complaint was subject to dismissal on the pleadings. *Id.* at 7, 10.

The trial court granted Appellants’ leave to amend, and the relevant portion of the complaint was amended to read: “The Sidewalk, planting strip, and parking areas located outside the south end of this building are along 40 East Main Avenue and are under the control of the defendants 40 Main LLC, and First American **along with defendant City of Spokane.**” CP 108 (emphasis in original removed, my emphasis added). The trial court

denied Appellants' motion to continue Respondents' motion to dismiss on the pleadings. *Report of Proceedings*, 15.

At the subsequent hearing on Respondents' motion to dismiss, 40 Main and First American separately briefed numerous cases and issues for the court, and argued for the dismissal of Appellants' amended complaint because the allegations of the amended complaint were insufficient to establish a duty of care on either party with respect to the abutting land in question. *See* CP 74-79, 90-98, 190-197, 202-208.

40 Main argued that to survive a motion on the pleadings, Appellants needed to show some "set of facts...consistent with the pleadings" that would establish a duty, even if such facts were hypothetical. *Record of Proceedings*, 19:18-20:1. Specifically, 40 Main argued that this required some language in the pleadings consistent with "special use" or "exclusive control" of the property in question, and that without such, no hypothetical facts proposed by Appellants could establish a duty of care owed by 40 Main. *Id.* at 27:4-16.

First American argued that pursuant to the case law briefed by the parties, including *Coulson v. Huntsman Packaging Prod, Inc.*, 121 Wn. App. 941, 92 P.3d 278 (2004), even discovery of ongoing maintenance of the abutting property was insufficient to establish exclusive control or

special use, and that without pleading either, Appellant's amended complaint was subject to dismissal. *Record of Proceedings*, 32:4-17.

Co-Defendant City of Spokane (not a party to the present appeal) acknowledged that it was undisputed the accident at issue occurred on property belonging to the City of Spokane. *Id.* at 34:5-8.

Counsel for Appellants argued that a city municipal ordinance required maintenance of the disputed planting strip area, *Id.* at 38:16-19, and that by using the property "at least twice a year" for maintenance purposes, 40 Main would have notice of its duties with respect to this strip of land. *Id.* at 40:13-25. Appellants also argued that the sprinkler system and manhole cover in the planting strip were an "artificial structure" that was "clearly dangerous" and "clearly not maintained properly," and the existence of an artificial structure in the planting strip established a duty of care upon Respondents, even if Appellants' amended complaint did not allege special use or exclusive control. *Id.* at 41:10-19.

The court, on its own accord, raised the issue that the municipal ordinance cited by Appellants "creates no specific duty" on a party, and that the Appellants' pleadings only allege the property on which the accident occurred was owned by the City and jointly controlled by the City of Spokane and by Respondents. *Id.* at 43, 44. The court then decided, citing to *Coulson*, that "just maintaining" an area of abutting property "isn't

enough to create a duty,” and held that based upon Appellants’ failure to plead special use (or anything beyond mere maintenance) 40 Main and First American ought to be dismissed from the suit. *Id.* at 52:10-13, 52:24-53:4.

#### **IV. STANDARD OF REVIEW**

Review of an issue of law, such as whether a legal duty exists, is reviewed *de novo* by an appellate court. On a motion to dismiss, the court looks to the complaint to determine whether the claimant can prove any set of facts consistent with the complaint that would entitle the claimant to relief. *Brief of Appellants*, 14, citing to *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). While Appellants claim that they may raise any “hypothetical situation” or fact pattern to survive dismissal, such hypotheticals must be consistent with the complaint. *Brief of Appellants*, 13-14, *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

#### **V. ARGUMENT**

The trial court correctly dismissed Respondents because, based upon the pleadings, there existed no facts that could establish 40 Main or First American owed a duty of care to Appellants. To succeed on a negligence claim, “the plaintiff must establish (1) a duty owed to the

complaining party, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.” *Wilson v. City of Seattle*, 146 Wn. App. 737, 194 P.3d 997 (2008).

A property owner does not owe a duty of care to passersby on abutting property and is not an “insurer of all those who may...pass by.” *Hutchins v. 1001 Fourth Avenue Associates*, 116 Wn.2d 217, 233, 802 P.2d 1360 (1991). However, an exception exists if said property owner has made special use of the abutting property, or has exercised exclusive control of the property. *See references supra to Hoffstatter, Coulson*. As it relates to a motion to dismiss, this special use must be specifically pled by the complaining party, otherwise, the default standard applies and no duty exists. *See Seiber v. Poulsbo, Inc.*, 136 Wn. App. 731, 739 (2007).

**A. Duty of care of abutting property owner does not arise without “special use” or “exclusive control” of abutting property, a claim that was not pled by Plaintiff**

**1. Case law establishes standards for determining special use**

“Special use” as a legal term has no implicit definition without additional context. In the present dispute, special use is the use of abutting property “out of which [the landowner] profits; he makes some gain.” *Stone v. City of Seattle*, 64 Wn.2d 166, 169, 391 P.2d 179 (1964).

In *Stone*, a property owner used a sidewalk “as a driveway for vehicles,” a use that the Supreme Court of Washington held created a duty

of reasonable care not to create conditions on the abutting property “unsafe for the passing thereon of pedestrians.” *Id.* at 170. *Stone*, and the various cases that followed its precedent, analyzed the use of abutting property that constituted special use. *See James v. Burchett*, 15 Wn.2d 119, 121 (1942) (using the sidewalk as a “driveway for vehicles” into a used-car business constituted special use of abutting property); *Edmonds v. Pac Fruit & Produce Co.*, 171 Wash. 590, 590-91 (1933) (creating a “driveway across the sidewalk” for the loading and unloading of merchandise constituted special use of abutting property); *Groves v. Tacoma*, 55 Wn. App. 330, 332 (1989) (creating a driveway for “business invitees...in exiting” the property and thereby causing deterioration to the sidewalk constituted special use of the abutting property). It is important to note that each of these cases examined the special use of a sidewalk on abutting property, not a planting strip, an area over which a different standard applies. *See Id.*

Special use of a planting strip was examined by Division I of the Court of Appeals in *Hoffstatter*, in which the court explained that the special use in each of the *Stone* line of cases caused the wear, depression, or degradation of the abutting sidewalk that caused the underlying injury at issue. *Hoffstatter* at 602. In *Hoffstatter*, a plaintiff filed suit against a landlord (Michael Peck) and tenant (Frank Frick) after the plaintiff tripped on an uneven concrete and brick planting strip between the car parking area

and the sidewalk in front of a store owned by Peck. The court held that a planting strip's "reasonable safe condition" was not the same as a sidewalk's reasonable safe condition based upon the different purpose of a planting strip, thus planting strips were not required to be "maintained in the same condition" as a sidewalk. *Id.* at 600. The court noted that the uneven brick and concrete areas had been caused by tree roots growing and dislodging said bricks, an "obvious condition" that the court ruled should have been noted by the plaintiff. *Id.* The plaintiff argued that insufficient maintenance of the planting strip created a duty of care of the abutting property on the landlord, but the court ruled that because the landlord had not used the property for a personal purpose or a special use, the "neighborly maintenance" of "trimming trees, sweeping leaves and gardening" by the landlord did not "give rise to a duty of care." *Id.* at 602-603.

The *Coulson* case, which Appellants claim was relied upon in error by the trial court, provides more. *See Appellants' Brief* at 16. In *Coulson*, a plaintiff brought suit after a car accident and claimed that an overgrown tree on a planting strip abutting land owned by defendant Pliant and leased to defendant Huntsman Packaging Products, Inc., had blocked his view of a stop sign, thereby contributing to the accident. *Coulson* at 943. Plaintiff therein claimed that because Pliant had maintained the planting strip, a duty was owed to maintain it in a reasonably safe condition. *Coulson* at 943.

The court analyzed the plaintiff's citation to Section 363 of the Restatement (Second) of Torts and ruled that the cited section had not been adopted in Washington state, citing instead to *Hoffstatter*. *Id.* at 945-946. The *Coulson* court adopted the legal rulings in *Hoffstatter*, holding that "neighborly maintenance" was insufficient to establish a duty, *Id.* at 948, even when Pliant had hired a landscaper to maintain the planting strip weekly "for more than a decade prior," because such maintenance was insufficient to establish "intent to control the planting strip to the detriment or exclusion of the city...or any member of the public." *Id.* at 947, 48 (emphasis added). Without such exclusionary intent, the court ruled that no duty of care over the abutting planting strip could exist. *Id.*

Finally, in *Seiber v. Poulsbo, Inc.*, 136 Wn. App. 731 (2007), the Washington Court of Appeals reviewed a case wherein a woman tripped and fell on a boardwalk and sued the adjacent property owner, alleging the owner had a duty to maintain the abutting property as a result of displaying merchandise on the abutting property. *Id.* at 736-737. However, the court upheld the initial dismissal, noting that only if an abutting landowner is using abutting property, such as a sidewalk, for their "own special purposes" do they have a "duty to maintain the walk in a reasonably safe condition." *Id.* Even then, the pleadings must specify that the special use caused "a defect to develop" on the abutting property. *Id.* at 739. An allegation of

deficient design only permits a cause of action against the entity “responsible for” the abutting property, not the adjacent landowner. *Id.*

As a result, a property owner does not owe a duty of care to a passerby unless special use or exclusive control has been exhibited or exercised by the abutting landowner. This special use must be **specifically pled** by the complaining party.

**2. No hypothetical argument consistent with Appellants’ complaints meets standards of Hoffstatter or Coulson**

Even in the face of a motion threatening dismissal of Appellants’ amended complaint for failure to plead special use or exclusive control, Appellants’ final complaint<sup>1</sup> (the Second Amended Complaint) alleges that the “sidewalk, planting strip, and parking areas” abutting 40 Main’s property was “under the control of...40 Main, LLC and First American along with defendant City of Spokane.” CP 108. At no point does the complaint allege use of the abutting property for any special purpose or function that will financially benefit or inure some profit to 40 Main or First American. *Id.*

Appellants’ also allege that the planting strip in question is jointly controlled by all defendants, 40 Main, First American, and the City of

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<sup>1</sup> While Appellants did not file or serve the Second Amended Complaint and is thus not part of the record, except as an attachment to Appellants’ motion to amend, the trial court granted the amendment and based its dismissal off the language therein, therefore 40 Main argues its case in relation to the Second Amended Complaint.

Spokane. CP 108. Appellants have also not alleged that 40 Main or First American excluded others from the abutting property; they allege and argue that the abutting property is regularly used as a “pedestrian pathway.” *Report of Proceedings* at 38:24-39:3.

Last of all, Appellants’ argue that all three defendants, 40 Main, First American, and the City of Spokane, somehow collectively and deficiently designed or installed the alleged tripping hazard, a which *Seiber* holds can only be levied against the entity in control of the property: the City of Spokane.

Thus, Appellants cannot establish an essential element of their case—the duty of 40 Main or First American—and the trial court correctly dismissed Appellants’ complaint against Respondents.

**B. Duty of care through presence of artificial versus natural conditions is unsupported by case law, which requires special use or exclusive control over abutting property**

Appellants argue a different legal standard without providing any basis for overturning *Hoffstatter*, *Coulson*, or any other case cited herein that requires “special use” and “exclusive control” to establish a duty of care on an abutting landowner. Appellants argue for a standard that looks to the presence of artificial versus natural conditions of the abutting land at issue. This is not the legal standard for premises liability of abutting property in

Washington, and Appellant cites to no case law in support of this interpretation.

1. *Case law mentioning artificial conditions refers to owned land, not abutting land*

Appellants' brief discusses *Hutchins* and *Rosengren v. City of Seattle*, 149 Wn. App. 565, 205 P.3d 909 (2009) in support of the claim that artificial conditions on abutting land create a duty of care on an abutting landowner. *Appellants Brief* at 15. Appellants misapply these cases to the present dispute. *Hutchins* and *Rosengren* applied to artificial conditions on the land owned by the defendants therein, not the abutting land. The argument that an artificial condition on abutting property can create a duty of care on an abutting property owner is unsupported by these cases.

40 Main did not (and does not now) admit to the allegations regarding who installed the concrete cover and the irrigation box on the City of Spokane's land abutting 40 Main's land. CP 60. However, the identity of who installed the items in the abutting property is irrelevant, because the precedent regarding a duty of care of an abutting land owner requires exclusive control or special use, neither of which has been pled and neither of which would change if a party to the suit had installed a sprinkler system on this land, because such installation would not constitute special use or exclusive control. *See supra*. Further, the alleged installation of the

sprinkler system, by Appellants' own language in their pleadings, was for the purpose of maintaining the grass and vegetation of the planting strip, maintenance that is insufficient to establish a duty. *See Hoffstatter*.

The *Rosengren* case reviewed the allegations of a plaintiff who had tripped on a sidewalk that had buckled or raised up as a result of tree root growth from a tree planted on the abutting landowner's land by the landowner. The court stated that the doctrine of special use was inapplicable because the case actually concerned trees planted on the property owner's own land, creating "an artificial condition on the land." *Rosengren* at 573. The court concluded that trees planted by a landowner **on his own land** constituted an "artificial condition" for which they had a duty to exercise reasonable care. *Id.* at 575. The case did not analyze the landowner's conduct with respect to the abutting property.

Appellants point to supposed dicta in the *Coulson* ruling by claiming that "the [*Coulson*] Court signaled its decision would have been different had the condition been artificial as opposed to natural," *Appellants' Brief* at 17, but this claim is erroneous and misleading, as the *Coulson* court makes no such statement; in fact, at no point in the *Coulson* decision is the word "artificial" used at all. *See Coulson*, generally. Appellants' argument is wholly unsupported.

**C. Breach of duty not an issue before trial court, presumes non-existent duty, and erroneously focuses on discovery**

Appellants' other arguments in the present matter are on factual issues or shortfalls in discovery, neither of which are applicable to a motion to dismiss on the pleadings. *Appellants' Brief* at 10-13, 16, 17.

**1. Discovery issues not appropriate to determine on motion on the pleadings and breach of duty unsupported**

Appellants' brief dedicates four pages to interrogatory questions that 40 Main has not answered, despite the fact that Appellants could set forth any hypothetical facts consistent with the complaint in response to Respondents' motion to dismiss, yet fails to do so. *See Appellants' Brief* at 6-9. Further, Appellants argue that a duty of care exists (without support) and complain that Respondents breached this duty through their conduct, an issue not under consideration in this appeal and an issue not a subject of the initial motion to dismiss on the pleadings. *Appellants' Brief* at 17-18. Appellants even argue that they never had the opportunity to depose 40 Main or receive answers to interrogatories. *Id.* at 10, 11.

These arguments fail to address the issue before the court, and confuse the standard of a CR 12(c) motion on the pleadings with a CR 56 summary judgment standard, despite the fact that Appellants made no efforts to present "matters outside the pleadings," *see* CR 12(c), and would

be precluded from arguing such on appeal. *See Report of Proceedings* at 38-45, *and see* RAP 2.5 (a).

However, even if considered, Appellants cannot establish a breach of duty because according to both *Hoffstatter* and *Wilson v. City of Seattle*, 146 Wn. App. 737, 194 P.3d 997 (2008), manhole covers are “common” and not “unreasonably dangerous,” nor is unevenness in an area “designed for public utility” “unreasonably dangerous.” *See Wilson* at 738, *Hoffstatter* at 598. Thus, the very conditions complained of by Appellants are not, as a matter of law, unreasonably dangerous.

2. **Denial of motion to continue not subject to appeal and was not abuse of discretion**

Connected to this issue is Appellants’ claim that the trial court failed to properly consider the continuance motion, a distraction and an inappropriate appellate argument, because denial of a continuance motion is not a final judgment and is not a matter Appellants are entitled to appeal as a matter of right pursuant to RAP 2.2, nor was a notice of appeal on this issue timely filed, because Appellants’ motion to continue the hearing was denied on October 25, 2019, CP 198-199, and the notice of appeal was filed on November 27, 2019, to which a copy of the order denying the continuance is not attached and not mentioned. CP 220-225. Because the order was not appealable and a notice of appeal was not presented until 33

days after this decision was made, this issue cannot be considered on appeal pursuant to RAP 5.2 and RAP 5.3.

Even if considered by this court, Appellants themselves have argued that such a ruling could only be reversed upon a showing of manifest abuse of discretion. *Appellants' Brief* at 19. In support of this, Appellants point to the discovery they had sought to perform. Discovery of factual information is not considered on a motion to dismiss on the pleadings, and therefore denial of Appellants' motion for continuance to conduct such discovery was not an abuse of discretion and was, at worst, harmless error. *See* CR 12(c).

## **VI. CONCLUSION**

**The Court of Appeals should uphold the trial court's ruling.**

Appellants' arguments lack precedent or sufficient argument to overturn the trial court's ruling. Appellants' pleadings were deficient on their face because their pleadings admitted that the accident at issue occurred on the City of Spokane's property and not 40 Main's property; *Coulson, Hutchins, and Hoffstatter* conclude that 40 Main has no duty to maintain the property abutting its own property, whether that property was in its artificial or natural condition.

Further, Appellants' pleadings did not assert that 40 Main had exclusively controlled or specially used the abutting property, and the precedential cases of *Coulson*, *Hoffstatter*, and *Stone* support the conclusion that 40 Main has no duty. As a result, Appellants' pleadings are factually insufficient to establish the essential element of a duty on 40 Main or 40 Main's tenant, First American, and dismissal of Appellants' amended complaint on the pleadings was proper.

RESPECTFULLY SUBMITTED this 22nd day of July, 2020.

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I hereby certify that on the 22nd day of July, 2020, the foregoing was filed and served on the following parties via the Washington State Appellate Court's Secure Portal at the electronic mail addresses indicated below:

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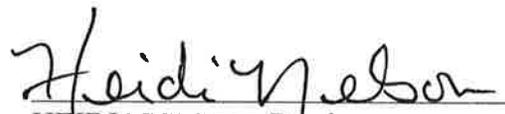
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