

70267-0

70267-0

No. 70267-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

HANNALORE W. MALLETT,

Appellant,

v.

ADELPHI, LLC, a Washington limited liability company, and/or SMITH
FAMILY REAL ESTATE, LLC, a Washington limited liability company
both d/b/a Adelphi Apartments

Respondents.

A handwritten signature in black ink is written over a faint, rectangular date stamp. The signature is slanted upwards from left to right. The date stamp contains the text "FILED" at the top, "APR 11 2017" in the middle, and "70267-01" at the bottom.

**BRIEF OF RESPONDENTS ADELPHI, LLC, AND SMITH
FAMILY REAL ESTATE, LLC**

Counsel for Respondents Adelphi, LLC,
and Smith Family Real Estate, LLC

Richard L. Martens, WSBA #4737
Steven A. Stolle, WSBA #30807
MARTENS + ASSOCIATES | P.S.
705 Fifth Avenue South, Ste. 150
Seattle, WA 98104-4436
Telephone: 206.709.2999
email: rmartens@martenslegal.com

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 3

 A. Ms. Mallett’s Alleged Fall 3

 B. Ms. Mallett Failed to Establish a Lift Caused the Hole 5

III. ARGUMENT 10

 A. The Court’s Review of the Summary Judgment is De Novo 10

 B. Summary Judgment was Proper Because there was a Complete Failure of Evidence Supporting Ms. Mallett’s Claims 12

 1. Adelphi owed no duty to Ms. Mallett to maintain the city sidewalk. 13

 2. Ms. Mallett relies on speculation and conjecture to assert that a heavy metal tracked lifter caused the hole in the sidewalk. 15

 3. Even assuming the contractor caused the damage, Adelphi is not liable for the negligence of an independent contractor 21

 C. The Small Hole Ms. Mallett Allegedly Tripped in Was an Open and Obvious Condition 28

IV. CONCLUSION 29

APPENDIX 32

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

<i>Albin v. Nat'l Bank of Commerce of Seattle,</i> 60 Wn.2d 745, 375 P.2d 487 (1962).....	25, 26
<i>Barrie v. Hosts of Am., Inc.,</i> 94 Wn.2d 640, 618 P.2d 96 (1980).....	10
<i>Dowler v. Clover Park Sch. Dist. No. 400, 1</i> 72 Wn.2d 471, 258 P.3d 676 (2011).....	10
<i>Grimwood v. U. of Puget Sound, Inc.,</i> 110 Wn.2d 355, 753 P.2d 517 (1988).....	18
<i>Harris v. Ski Park Farms, Inc.,</i> 120 Wn.2d 127, 844 P.2d 1006 (1994).....	10
<i>Hickle v. Whitney Farms, Inc.,</i> 107 Wn. App. 934, 29 P.3d 50 (2001).....	21, 22
<i>In re Domingo,</i> 155 Wn.2d 356, 119 P.3d 816 (2005).....	27
<i>In re Dunn's Estate,</i> 31 Wn.2d 512, 197 P.2d 606 (1948).....	28
<i>James v. Burchett,</i> 15 Wn.2d 119, 129 P.2d 790 (1942).....	24-26
<i>LaPlante v. State,</i> 85 Wn.2d 154, 531 P.2d 299 (1975).....	10
<i>Mackey v. Graham,</i> 99 Wn.2d 572, 663 P.2d 490 (1983).....	11

<i>Michak v. Transnation Title Ins. Co.</i> , 148 Wn.2d 788, 64 P.3d 22 (2003).....	10
<i>Mouso v. Bellingham & N. Ry. Co.</i> , 106 Wash. 299, 179 P. 848 (1919).....	20
<i>Peterick v. State</i> , 22 Wn. App. 163, 589 P.2d 250 (1977).....	12
<i>Prentice Packing and Storage Co. v. United Pac. Ins. Co.</i> , 5 Wn.2d 144, 106 P.2d 314 (1940).....	15
<i>Rivett v. City of Tacoma</i> , 123 Wn.2d 573, 870 P.2d 299 (1994).....	13, 23
<i>Seattle v. Shorrock</i> , 100 Wash. 234, 170 P. 590 (1918).....	13
<i>Seiber v. Poulsbo Marine Center, Inc.</i> , 136 Wn. App. 731, 150 P.3d 633 (2007).....	29
<i>Schmidt v. Pioneer United Dairies</i> , 60 Wn.2d 271, 373 P.2d 764 (1962).....	16, 20
<i>State v. Knighten</i> , 109 Wn.2d 896, 748 P.2d 1118 (1988).....	28
<i>State v. Smith</i> , 174 Wn. App. 359, 298 P.3d 785 (2013)	26
<i>Stenberg v. Pacific Power & Light Co., Inc.</i> , 104 Wn.2d 710, 709 P.2d 793 (1985).....	12
<i>Stone v. Seattle</i> , 64 Wn.2d 166, 391 P.2d 179 (1964).....	13
<i>Stout v. Warren</i> , 176 Wn.2d. 263, 290 P.3d 972 (2012).....	21, 25

<i>Taylor v. Stevens County</i> , 111 Wn.2d 159, 759 P.2d 447 (1988).....	12
<i>Tincani v. Inland Empire Zoological Society</i> , 124 Wn.2d P.2d 226, 677 P.2d 166 (1984).....	12
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	10

FEDERAL CASES

<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....	11
---	----

OTHER STATE CASES

<i>Reichert v. Phipps</i> , 84 P.3d 353 (Wyo. 2004).....	6
---	---

SEATTLE MUNICIPAL CODE

SMC § 15.72.....	23
------------------	----

WASHINGTON STATE RULES

CR 56(c).....	10
CR 56(e).....	18
RAP 9.12.....	10

OTHER AUTHORITIES

Bennett, Robert M., *The Fibromyalgia Syndrom*,
Textbook of Rheumatology 511, 513 (5th Ed).....6

RESTATEMENT (SECOND) OF TORTS § 349..... 13

RESTATEMENT (SECOND) OF TORTS §349, Illustration No. 1..... 14

WPI 135.01.....26-27

I. INTRODUCTION

The parties to this case agree on one thing: the present appeal turns on legal responsibility for a small hole in the city sidewalk where plaintiff/appellant Hannalore Mallett alleges she tripped and fell outside the Adelphi Apartments in Seattle.¹ The superior court determined on summary judgment that there was no genuine issue of material fact and that defendants/respondents Adelphi, LLC, and Smith Family Real Estate, LLC, (hereinafter referred to collectively as “Adelphi”) were entitled to summary judgment dismissal because Adelphi owed no legal duty to Ms. Mallett with regard to the hole at issue. This Court should affirm, whether on this basis or the other bases supported by the record, including lack of proximate cause and/or that the hole in the sidewalk was an open and obvious condition known to Ms. Mallett.

First, Ms. Mallett submitted no competent evidence that the small hole that she alleges she tripped in was made by a metal tracked man-lift, or lifter, which she claims to have seen in front of the building. Rather, she testified that she had not seen the hole before the lifter was there, but she did see it after without specifically delineating the time interval

¹The size of the hole is shown in the photographs attached as exhibit A in the appendix.

between the two. Tellingly, she did not observe the lifter actually causing the hole she alleges she tripped in. So her theory of causation for the hole is merely an assumption, and that assumption is totally contrary to all the other admissible evidence of record, including indisputable physical facts.

Second, even assuming, as alleged by Ms. Mallett, there was a metal tracked lifter in the area of the small hole and that lifter was operated by the pest control company retained by Adelphi, and even assuming the pest control company caused the small hole in the sidewalk, Ms. Mallett submitted no competent evidence, expert opinion, or authority to support imposing liability against Adelphi, the abutting property owner, for damage to a city sidewalk allegedly caused by an independent contractor.

Adelphi's motion for summary judgment was, in essence, a "no evidence" motion, asserting that Ms. Mallett lacked admissible evidence for a reasonable trier of fact to hold Adelphi liable for her injury. Ms. Mallett's bare arguments unsupported by admissible evidence in the record failed to persuade the honorable superior court judge that there was a genuine issue of material fact to take this case to trial, and they should not persuade this Court. Rather, the dismissal on summary judgment of Ms. Mallett's negligence claims should be affirmed in all respects.

II. STATEMENT OF THE CASE

A. Ms. Mallett's Alleged Fall.

On or about Christmas Day, December 25, 2010, plaintiff/appellant Hannalore Mallet alleges she was walking her dog, Toby, in front of the Adelphi Apartments in Seattle, where she was a tenant, when she tripped in a small “hole” in the city sidewalk and fell, injuring her shoulder.

Just after her fall, Ms. Mallett told the building’s resident manager, Katie Brockman, that “her dog pulled her down” and that it was because of another tenant’s cat sitting in the window. CP 33-34, CP 37 at Ins. 6-11. She was so upset about the cat being the cause of her fall (not her inability to control her dog) that she demanded Ms. Brockman do something about it. CP 38 at Ins. 20-25. When Ms. Brockman explained that she could not tell another tenant where their cat could sit in the apartment, Ms. Mallett complained to Nancy Smith, the managing member of the entity that owns the building, Adelphi, LLC, again demanding something be done about the cat. *See id.*; CP 40; CP 54. Ms. Smith similarly told Ms. Mallett that the management of the Adelphi cannot enforce restrictions on where tenants’ pets sit in their units and suggested she use an alternate entrance to avoid her dog seeing the cat in the window. CP 54 ¶ 4.

Ms. Mallett sought treatment for her claimed injuries from two

different medical providers, telling each one separately that her dog had gone after a cat and pulled her to the ground. CP 46 (“fall on cement pulled down by dog.”); CP 52 (“Walking dog which tried to chase cat - pulled [patient] over and she fell backwards.”). There was no mention of any issue with the sidewalk. *See ids.* The contemporaneous records mention no hole, no metal tracked vehicle, no rubber tired lifter, no sidewalk “defect,” no construction repair activity, and, indeed, simply nothing similar to her current story other than the fact she was walking her dog, the dog saw a cat, and the dog went in the direction of the cat.

Nevertheless, by the time Ms. Mallett filed her complaint in this case, she alleged that she “tripped on the sidewalk damaged by her landlord . . . and/or allowed by her landlord to remain in a state of dangerous disrepair.” CP 2 ¶ 5. And, for purposes of summary judgment only, Adelphi assumed the truth of Ms. Mallett’s factual allegation that she tripped in a small hole in the city sidewalk. CP 15, lns. 3-6. As it must, Adelphi makes the same assumption for purposes of this appeal. But the actual facts point in another direction. And that assumption, *arguendo*, does not lead to liability.

Curiously, prior to this lawsuit, Ms. Mallett “never told [Ms. Brockman] she tripped in a hole.” CP 32, lns. 22-23; CP 41-42. Nor did

she report any hole or other damage in the sidewalk to the building owner. CP 54 ¶ 5; CP 169, Ins. 10-12. Ms. Mallett confirmed in her deposition that she never reported the hole at issue to the landlord. *See* CP 223-24 (internal cite at 72:17 - 73:22). In fact, she initially testified at deposition that she had never noticed the hole before. CP 215 (internal cite at 39:23-40:5) (Q. So had you noticed that hole in the sidewalk before? A. No.).

Nor had the landlord noticed the small hole or appreciated that it presented any sort of hazard, particularly since no one had reported falling there before. CP 42, Ins. 7-11. Rather, the hole was “repaired” when the permit needed for other work done in 2012 required larger areas of exposed soil around some nearby trees, and the enlarged tree wells encompassed the area of the small hole. *See* CP 54-57.

B. Ms. Mallett Failed to Establish a Lift Caused the Hole.

Ms. Mallett maintained in her deposition – eventually – and later on summary judgment that the hole where she allegedly tripped was caused by a lifter used by Dominion Pest Control to reach the soffits under the roof of the Adelphi Apartments to seal up any gaps where a bat that was found in one of the apartments might have entered. CP 79 ¶ 1; CP 81-82 ¶ 6; CP 222-23; *but see* CP 215 (internal cite at 39:23-40:5) (Q. So had you noticed that hole in the sidewalk before? A. No.). She testified that

she observed the lifter as it started work in the alley behind the building, observing that it “was one of those really heavy ones with – with a metal track.” CP 223. Throughout her testimony and her first declaration on summary judgment, Ms. Mallett refers to only one lifter, which started work on the south side of the building, continued up the east side through an alley, then turned west up East Thomas Street, which is where it actually broke up the sidewalk. CP 79 ¶ 1; CP 81-82 ¶ 6; CP 222-25. As Ms. Mallett testified, “the lifter went – went all the way around.” CP 222. Ms. Mallett testified that she did not actually see the lifter cause the small hole she tripped in. Rather, the tiny hole was not there before she saw the lifter on 23rd Avenue East, but was there afterward. CP 81-82; CP 225. Based on this, she simply assumes the lifter caused the hole. *See ids.* But unknown gaps of time in a chronology have never equated to proximate causation. *See, e.g., Reichert v. Phipps*, 84 P.3d 353, 361 (Wyo. 2004) (“Patients frequently attribute an ‘event’ to the onset of their symptoms. Attribution and rationalization are common human traits and **correlation** does not equal **causation**. . . .”), *quoting* Robert. M. Bennett, *The Fibromyalgia Syndrom*, Textbook of Rheumatology 511, 513 (5th Ed) (emphasis in original).

Adelphi then submitted a declaration from Anthony Wurst, the

owner of Dominion Pest Control, the independent contractor who did the bat remediation, identifying the make and model of lifter used on the project, including a receipt for the rental. *See* CP 245-56. Mr. Wurst also stated that the JLG 800 Series lift was the **only** lift used by Dominion on the Adelphi job, and Dominion had always intended to use ladders on the side of the building where Ms. Mallett fell, as indicated in Dominion's proposal. *See* CP 246-47 ¶ 6; *compare* CP 126-27 (proposal).

Mr. Wurst confirmed that the wheeled lift used by Dominion caused the sidewalk damage on East Thomas Street, which – tellingly – was repaired at Dominion's expense. CP 247. But Mr. Wurst denied that Dominion used the lift – or any lift – on 23rd Avenue East, where the small hole at issue was located. CP 246-47. First, Dominion never intended to use a lift on that side of the building, as indicated in its proposal. CP 246-47. Second, once the lift began breaking up the sidewalk along East Thomas Street, Dominion would not have continued moving it around to 23rd Avenue East and risked the additional damage and cost of repair. *See id.*

In addition, the eighty foot lift (a lift with a reach of eighty feet) rented by Dominion had large rubber tires, not metal tracks. *See* CP 252-56; CP 238. The lift was eight feet wide. CP 256 (Dimension B). So it

was physically impossible for the lift used by Dominion to turn the corner from East Thomas to the west side of the building along 23rd Avenue East, where the small hole at issue was located, because a metal support for the trolley bus lines up 23rd Avenue East was only seven feet, nine inches from the corner of the building – a clearance too small to accommodate the eight foot wide lift. *See* CP 260-66. Moreover, because 23rd Avenue East is a major thoroughfare, it would have been impractical to drive the lifter into the road against oncoming traffic to go around the metal support pole. *See* CP 111, ln. 24, *to* CP 112, ln. 8.

If Dominion had somehow driven the lift around the corner from East Thomas Street onto 23rd Avenue East, the damage would have looked completely different from the small hole in the sidewalk along 23rd Avenue East. *Compare* CP 66-70 (hole on 23rd Avenue East), *with* CP 257-69 (damage on East Thomas).

Adelphi also submitted the declaration of a structural and forensic engineer named David VanDerostyne, P.E., of Madsen, Kneppers & Associates, Inc. *See* CP 58-64; CP 126. Mr. VanDerostyne opined, based on his review of close up color photographs of the hole at issue taken by Ms. Mallett's counsel a few weeks or months after Ms. Mallett's fall, that "[b]ased on my observation of the coloration of the concrete sides within

the void, the crumbled and otherwise degraded condition of the loose pieces of concrete, and the weathered condition of the void edges, it is my professional opinion that the void identified by plaintiff and her counsel formed at least two to three years, and probably more, before the photographs of the void were taken.” CP 61. Although Ms. Mallett now claims entitlement to challenge these opinions before a trier of fact, Ms. Mallett did not attempt to rebut these opinions on summary judgment. *See generally*, CP 71-78. Indeed, she offered no expert testimony at all.

In response to all the evidence that the lift used by Dominion Pest Control did not damage the sidewalk in front of the building – in fact, never was and physically could not have been in front of the building – Ms. Mallett submitted a second declaration on summary judgment, backtracking from her prior declaration and deposition testimony that “the lift” used by Dominion had caused the damage. *See* CP 267-68. In this new declaration, Ms. Mallett asserted for the first time that there were or must have been two lifts – not one – and speculated that maybe the lift with metal tracks belonged to “my landlord, Nancy Smith.” CP 267.

In sum, there was, and is, insufficient evidence in the record for Ms. Mallett to maintain a negligence cause of action against Adelphi, and the superior court properly granted Adelphi’s motion for summary

judgment dismissal. CP 269-71.

III. ARGUMENT

A. The Court's Review of the Summary Judgment is De Novo.

This Court's review of the order on summary judgment is de novo, "engaging in the same inquiry into the evidence and issues called to the attention of the trial court." *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011), citing *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 127, 137, 844 P.2d 1006 (1994); RAP 9.12.

Summary judgment is proper if, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003). "A material fact is one upon which the outcome of the litigation depends." *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). "The moving party bears the initial burden of showing the absence of an issue of material fact." See *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), citing *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff." *Id.* The Court should

grant the motion if the nonmoving plaintiff then “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.*, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In *Celotex*, the United States Supreme Court explained this result: “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” 477 U.S. at 322-23.

A party seeking to avoid summary judgment cannot simply rest upon the allegations of her pleadings; she must affirmatively present the factual evidence upon which she relies. *Mackey v. Graham*, 99 Wn.2d 572, 576, 663 P.2d 490 (1983). In addition,

We recognize that the purpose of a motion for summary judgment pursuant to CR 56 is to examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists. A material fact is one upon which the outcome of the litigation depends in whole or in part ... A nonmoving party attempting to preclude a summary judgment may not rely on speculation, argumentative assertions that unresolved factual matters remain, or in

having its affidavits considered at their face value, for upon the submission by the moving party of adequate affidavits the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.

Peterick v. State, 22 Wn. App. 163, 180-81, 589 P.2d 250 (1977) (Internal citations omitted), *overruled on other grounds*, *Stenberg v. Pacific Power & Light Co., Inc.*, 104 Wn.2d 710, 709 P.2d 793 (1985).

B. Summary Judgment was Proper Because there was a Complete Failure of Evidence Supporting Ms. Mallet's Claims.

A claim for negligence requires the plaintiff to establish all of the elements of the cause of action: (1) the existence of a duty owed to plaintiff Hannalore Mallett, (2) breach of that duty by Adelphi, (3) resulting harm to Ms. Mallett, and (4) a proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d P.2d 226, 228, 677 P.2d 166 (1984). The threshold determination in a negligence action is whether Adelphi owed a duty of care to Ms. Mallett. *See Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). As the superior court concluded, Ms. Mallett cannot establish that the Adelphi owed or breached any duty to her arising from the condition of

the city sidewalk.

1. Adelphi owed no duty to Ms. Mallett to maintain the city sidewalk.

It is undisputed that the sidewalk on which plaintiff allegedly fell along 23rd Avenue East is owned by the City of Seattle. And it is well-settled that “an abutting landowner is not legally responsible for the physical condition of a public sidewalk unless that property owner causes or contributes to the condition.” *Rivett v. City of Tacoma*, 123 Wn.2d 573, 579, 870 P.2d 299 (1994), citing *Stone v. Seattle*, 64 Wn.2d 166, 169-70, 391 P.2d 179 (1964), and *Seattle v. Shorrock*, 100 Wash. 234, 245-46, 170 P. 590 (1918). Nor can the city shift its responsibility for the condition of a public sidewalk or liability arising therefrom onto the abutting property owner by ordinance. See *Rivett*, 123 Wn.2d at 581-82 (holding Tacoma ordinances purportedly shifting responsibility for city sidewalks to abutting property owners unconstitutional).

This is entirely consistent with the general common law rule stated in the RESTATEMENT (SECOND) OF TORTS § 349. See CP 21-22.

A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to

exercise reasonable care

(a) to maintain the highway or way in safe condition for their use, or

(b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know or are likely to discover.

The Restatement goes on to provide an illustration that is closely analogous to the present case:

A, while walking on the sidewalk of a city street upon which a house in the possession of B abuts, is hurt stumbling into a hole in the sidewalk which is caused by wear and tear and the working of the frost upon the bricks which pave it. This condition has been of long standing and is well-known to the city authorities and to B. B is not liable to A.

RESTATEMENT (SECOND) OF TORTS §349, Illustration No. 1.

In the present case, even assuming Ms. Mallett actually tripped in the small hole in the city sidewalk as she alleges, there simply is no admissible evidence that Adelphi caused or contributed to the creation of the hole. To the contrary, David VanDerostyne, a structural engineer retained by Adelphi, concluded that the hole was the product of the effects of time and weather on old concrete where two different concrete pours abutted. *See* CP 60-61, ¶ 9. Thus, Adelphi had no duty to either remedy

the condition or warn Ms. Mallett about it, which Adelphi did not recognize as a dangerous condition in any event. *See* CP 32-42; CP 54, ¶¶ 3-5.

In sum, plaintiff sued the wrong entities, as her real claim – to the extent she has one at all – is against the City of Seattle, which defendants identified as a potential non-party at fault in their answer to the complaint. *See* CP 7 (Third Affirmative Defense).

2. Ms. Mallett relies on speculation and conjecture to assert that a heavy metal tracked lifter caused the hole in the sidewalk.

Ms. Mallett's assertion of a genuine issue of material fact as to causation for the hole at issue is without merit. She is asking this Court to improperly rely upon speculation and conjecture to create an issue of fact as to causation for the hole. As the Washington Supreme Court stated the rule over seventy years ago:

Proof that goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.

Prentice Packing and Storage Co. v. United Pac. Ins. Co., 5 Wn.2d 144, 163, 106 P.2d 314 (1940). Similarly,

The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that can fairly and reasonably be drawn from them. A verdict cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed upon than two or more equally reasonable inferences from a set of facts, and under only one of the inferences would the defendant be liable, a jury will not be allowed to resort to conjecture to determine the facts.

Schmidt v. Pioneer United Dairies, 60 Wn.2d 271, 276, 373 P.2d 764 (1962) (emphasis added).

In the *Schmidt* case, the plaintiff sued his employer for personal injuries resulting from his slipping on some mud on the floor of his employer's property. On appeal from a directed verdict based on insufficiency of the evidence, the Supreme Court noted that the record did "not disclose how the alleged mud got on the floor, who put it there, or how long it had been there." *Id.* at 272. In affirming the trial court, the Supreme Court concluded: "Under these circumstances, there is no more reason to believe that the mud was placed there by employees of respondent than that it was placed there by appellant or a third party." *Id.* at 276. Similarly here, there is no actual admissible evidence of record to support plaintiff's conjecture that a contractor's lift caused the hole, rather

than it being there unnoticed for years as she originally testified and Mr. VanDerostyne concluded. *See* CP 215; CP 60-61.

The actual testimonial and declaratory evidence presented by Ms. Mallett – even after she repudiated her initial testimony that she had never noticed the hole before her fall – lacks sufficient factual foundation from her own observations to raise any genuine issue of material fact regarding whether the metal tracked lifter she claims was in front of the building caused the hole at issue.

Ms. Mallett did testify at deposition at some length about the lifter causing the damage. *See* CP 221-25 (internal citation at 63:1–80:8). But nowhere in this testimony did Ms. Mallett state that she saw the lift in close proximity to the area of the small hole or even where she saw it on 23rd Avenue East, nor did she see it roll over the location of the hole or cause the damage. *See id.* As she concluded on the subject:

Q. (By Mr. Stolle) So if I understand you so far, and correct me if I'm wrong, but your testimony is that the hole wasn't there before and it was there after they did the work with the lift; is that right?

A. Mm-hm.

Q. But you didn't actually see the lift roll over causing the damage; is that right?

A. I didn't see them cause – cause the damage, but it was – it – it was there.

Q. Okay.

A. But when they was done, it was there.

CP 225 (internal citation 79:23-80:8). In other words, the lift was there on 23rd Avenue East before Ms. Mallett saw the hole, therefore, the lift caused the hole. Logically, a faulty premise always leads to a false conclusion.

Similarly, in her first declaration on summary judgment, Ms.

Mallett stated:

The hole was not there before the bat work. . . . The lifter broke up the sidewalk around the apartment building, including the front of the building which is 23rd Avenue East. I saw the lifter in front of the building. The holes in front of the building were made by the lifter. The hole I tripped in was not there before the lifter doing the bat work.

CP 81-82. This is simply a series of conclusions, with the only statement of personal knowledge based on her own experience being that “I saw the lifter in front of the building.” CP 82. Like her deposition testimony, the first declaration on summary judgment lacks sufficient factual foundation based on personal knowledge to support the asserted conclusion that the lifter caused the hole. *See Grimwood v. U. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (“The ‘facts’ required by CR 56(e)

to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient.”) (citations omitted).

At the time of Ms. Mallett’s first declaration, she apparently believed there was only one lifter, the one with metal tracks, not the lifter with large tires that actually caused the sidewalk damage on East Thomas Street. After it was conclusively established that the lifter used by Dominion had large tires, not metal tracks, Ms. Mallett submitted her second declaration on summary judgment, stating:

As I told my landlord’s attorney, the hole in the sidewalk that I tripped over while my dog and I were distracted by the cat was made by a heavy lifter machine with metal tracks (not big tires like the one in the picture in the most recent court papers filed by my landlord) that was used in the front of my apartment building in the summer of 2010 before I fell on Christmas Day 2010. The holes in front of the building were made by the lifter. I am aware that my landlord, Nancy Smith, owns a lift machine company, so perhaps it was one of hers.

CP 267. Now, in her second declaration, Ms. Mallett again asserts the conclusion that a metal tracked lifter made the small hole she tripped in, but backs away from it being associated with the bat remediation, speculating that “perhaps” it belonged to her landlord. *See id.* Well, “perhaps” not.

In sum, in all of her deposition testimony and two declarations on summary judgment, Ms. Mallett never states where she saw the metal tracked lifter in relation to the location of the hole, never states she saw it moving over any part of the sidewalk, never states where the lifter was at the time she noticed the hole, and never states just how long after the lifter was gone that she noticed the hole. She only says that the hole was not there before, but it was there after. Thus, she is essentially asserting that, because the lifter was in the area at one point in time and at a subsequent point in time she noticed the hole, the lifter must have caused the hole. This is simply too thin a thread on which to hang her asserted inference that the lifter caused the hole. *See, e.g., Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 276, 373 P.2d 764 (1962) (“The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that can fairly and reasonably be drawn from them.”); *see also, Mouso v. Bellingham & N. Ry. Co.*, 106 Wash. 299, 303, 179 P. 848 (1919) (holding “where the physical facts are uncontroverted, and speak with such force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts, and therefore cannot differ.”).

Because Ms. Mallett’s theory is just speculation and conjecture

entirely contrary to the physical facts, it cannot present a genuine issue of material fact. This Court should affirm the superior court's order granting summary judgment dismissal.

3. Even assuming the contractor caused the damage, Adelphi is not liable for the negligence of an independent contractor.

Ms. Mallett asserts that Adelphi is responsible for her fall because Adelphi retained the services of the independent contractor, Dominion Pest Control, which Ms. Mallett alleges damaged the sidewalk, causing the hole in which she allegedly tripped. But she provides no legal authority for holding the owner liable for harm allegedly caused by an independent contractor on city property. In fact, Washington law is to the contrary. *See Stout v. Warren*, 176 Wn.2d. 263, 269, 290 P.3d 972 (2012) (“The general rule in Washington is that a principal is not liable for injuries caused by an independent contractor whose services are engaged by the principal.”).

There are three exceptions to the general rule of non-liability for an independent contractor's negligence, none of which apply here, nor were two of the three even arguably raised in the superior court or in Ms. Mallett's opening appellate brief. *See Hickie v. Whitney Farms, Inc.*, 107 Wn. App. 934, 940, 29 P.3d 50 (2001). These are (1) if the work is

inherently dangerous, (2) if the employer either causes or knows of and sanctions illegal conduct by the independent contractor, or (3) if the employer owes a nondelegable duty of care to persons injured by the work of the independent contractor. *See id.*

The first is in the case of an activity presenting an inherent risk of harm to third parties. Examples of such activities “include the use of dynamite, gun powder, firearms, or other flammable or explosive materials that fit our common understanding of the term.” *Hickle*, 107 Wn. App. at 941. No reasonable person would conclude that remedying some bats in the attic presented a special danger to others or even a special danger of damage to a city sidewalk. And Ms. Mallett never argued this exception either to the superior court or in her opening appellate brief.

Second is either causing or knowing of and sanctioning “illegal conduct” by the independent contractor. Even if one interprets this definition to include negligent damage to a city sidewalk as “illegal conduct,” there is simply no evidence in the record that Adelphi either caused or knew of any damage to the sidewalk was caused by Dominion in the area where Ms. Mallett allegedly fell. And certainly, Adelphi did not sanction it. Nor has Ms. Mallett presented any argument to that effect in either the superior court or to this Court.

Third is a nondelegable duty of care, such as might be imposed by statute. Ms. Mallett did argue to the superior court that a Seattle ordinance required Adelphi to repair the sidewalk. CP 77. However, the ordinance cited, Seattle Municipal Code § 15.72, does not impose a tort duty owed by an abutting landowner to third parties to repair the city sidewalk. *See* CP 194-95. Rather, it is a cost allocation mechanism whereby the city notifies the abutting landowner of the issue with the sidewalk and, if the landowner does not remedy it, the city will do it. *See id.* A mechanism is included to later determine who is responsible to pay for the work done. *See id.* Thus, the way the ordinance functions, a dangerous condition to the sidewalk is supposed to be repaired either by the abutting land owner or the city, with financial responsibility to be sorted out afterward. *See* SMC § 15.72. It is not a liability or burden-shifting ordinance, nor can it be, as the Washington Supreme Court declared such ordinances unconstitutional. *See Rivett v. City of Tacoma*, 123 Wn.2d 573, 579, 870 P.2d 299 (1994) (holding “an abutting landowner is not legally responsible for the physical condition of a public sidewalk unless that property owner causes or contributes to the condition.”). So the ordinance – on its face – simply does not apply to this case.

It is undisputed that Adelphi engaged Dominion Pest Control

Services, Inc., an independent contractor, to take care of a bat problem in the attic. There is no evidence, and Ms. Mallett does not even argue, that Adelphi exercised any control or authority over the means and methods Dominion utilized to perform the work. To the extent Dominion may have created the small hole at issue, plaintiff has her remedy against Dominion. She simply has no case for liability against Adelphi for a condition it did not create, contribute to, or even know about until well after Ms. Mallett's fall. Under these facts and the applicable law, Adelphi is not responsible for the negligence, if any, of an independent contractor. The superior court properly granted summary judgment to Adelphi, and this Court should affirm.

The authorities relied upon by Ms. Mallett do not change this conclusion. *See* Appellant's Opening Brief, pp. 12-16. In the *James* case cited by Ms. Mallett, the owner of abutting property operating a used car business used the sidewalk at issue for vehicular ingress and egress on a daily basis. *See James v. Burchett*, 15 Wn.2d 119, 121-22, 129 P.2d 790 (1942). The complaint was that rocks from the gravel-paved car lot were carried onto the sidewalk by the car tires such that the plaintiff then stepped on one of the rocks, which rolled, causing a fall. *See id.* at 122. Thus, the gravel coming from the car tires was a regular occurrence

incidental to the conduct of the abutting property owner's business and "a result of the business carried on by [the abutting property owner]," who "knew of this fact because their evidence showed that the duty of one of its employees to was to sweep the sidewalk each morning." *Id.* at 127. The court held that, under the circumstances, "the law imposed on appellants the exercise of reasonable care to guard the public from injury." *See id.* at 127.

James is distinguished from the present case by the fact that it was the owner of the abutting property who caused the dangerous condition, not an independent contractor. At most, assuming Ms. Mallett's theory of causation is correct, Adelphi hired an independent contractor to perform a discrete one-day job, and the independent contractor, not Adelphi, used the sidewalk to access the building. This was not a hazard that existed on the abutting property and was carried to the sidewalk, but one created on the city sidewalk by the independent contractor. Thus, this circumstance is unlike the *James* case, and the general rule of non-liability applies. *See Stout v. Warren*, 176 Wn.2d. 263, 269, 290 P.3d 972 (2012).

The *Albin* case relied upon Ms. Mallett is even less analogous to the present case. *See* Appellant's Opening Brief, pp. 13-14, *citing Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 375 P.2d 487 (1962).

In *Albin* the owner of forest land abutting a public road allowed a logging contractor to cut trees on a portion of the property near the road. The loggers left one tree, which, being deprived of the protection of the trees formerly surrounding it, fell onto the road, hitting the plaintiff's car. Ms. Mallett is correct that the court ruled that whether the owner of the property had constructive notice of a dangerous condition on the property was a jury issue, but that is beside the point here. *See* Appellant's Opening Brief, p. 13, *citing Albin* at p. 751.

In this case, the independent contractor did not create a dangerous condition *on Adelphi's property*, which then posed a threat to passerby on a public road or sidewalk. Ms. Mallett's contention is that the independent contractor created a dangerous condition on the public sidewalk, so Adelphi had a duty to inspect for a dangerous condition there. *See* Appellant's Opening Brief, p. 14. There is simply no legal support for that proposition, whether in *James* or in *Albin*.

Similarly, the Washington Pattern Jury Instruction cited by Ms. Mallett does not apply. Appellant's Opening Brief, p. 14, *citing* WPI 135.01. First, pattern jury instructions are not the law. *See State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785 (2013) ("While pattern jury instructions are intended to be accurate, concise, unbiased statements of

the law, they are not the law and are not mandatory.”), *citing In re Domingo*, 155 Wn.2d 356, 369, 119 P.3d 816 (2005). Second, WPI 135.01 concerns the duty of the owner of abutting property to use ordinary care in connection with the owner’s use of his or her property so as to not create an unsafe condition on a public sidewalk. That is not the issue here, as there is no issue of Adelphi’s use of its own property causing an unsafe condition on the city sidewalk, but of an independent contractor’s alleged use of a city sidewalk to perform work to Adelphi’s property. WPI 135.01 has no application here.

Finally, Ms. Mallett’s assertion that Adelphi admitted a duty to Ms. Mallett with regard to the city sidewalk is grossly misleading. *See* Appellant’s Opening Brief, pp. 15-16, *citing* CP 164. Ms. Mallett’s counsel asked Adelphi’s managing member, Nancy Smith, her understanding of Adelphi’s obligations “with the sidewalk as it relates to the city’s sidewalk and the city’s requirements?” CP 164 Ins. 2-4. And Ms. Smith answered that if Adelphi or someone they hired to do something damaged the sidewalk, then Adelphi would be responsible for repair. *See id.* Ins. 5-8. But when Ms. Mallett’s counsel phrased the question in terms of tort duties to pedestrians and tenants, Ms. Smith responded, “[m]y answer is that Dominion would be responsible because

they damaged it.” *Id.* Ins. 19-25. Thus, Ms. Mallett’s quotation from the first part of the questioning, but not the later part on the same page is misleading. Adelphi never admitted a tort duty to Ms. Mallett or anyone else. *See id.* In any event, that is a legal issue for the Court, not a determination by a lay party. *See, e.g., State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988) (An appellate court is not bound by a party’s erroneous concession of an issue of law), *citing In re Dunn’s Estate*, 31 Wn.2d 512, 528, 197 P.2d 606 (1948).

C. **The Small Hole Ms. Mallett Allegedly Tripped in Was an Open and Obvious Condition.**

Aside from the complete absence of any evidence that Adelphi caused, contributed to, or even knew about the hole Ms. Mallett claims she tripped in, the small hole itself was open and obvious condition known to Ms. Mallett. *See* CP 66-68. Viewing the disputed evidence in the light most favorable to Ms. Mallett, she maintains that she was specifically aware of the particular hole at issue for some four months after the bat work was done. So the small hole was undoubtedly present in the same location where Ms. Mallett walked her dog every day, perhaps multiple times per day, for a minimum of those four months. Thus, she walked right by or over the same hole many dozens, likely hundreds, of times in

those four months of residence at the Adelphi. *See* CP 27; *see also* CP 54-57, ¶¶ 3 & 7.

In sum, this was not a dangerous condition that Ms. Mallett happened upon unexpectedly; it was not hidden; to the extent it presented a “dangerous” condition at all, she had seen and avoided it many times over the four months after she maintains she became specifically aware of it, and she never once complained to Adelphi or its management about it. *See* CP 32-42; CP 54-55 ¶¶ 5-7. It cannot be contested that “[w]here an alleged dangerous condition is both obvious and known to a plaintiff, the defendants owe no duty to warn of this condition.” *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 740, 150 P.3d 633 (2007). To be sure, Adelphi does not believe the small hole at issue presented *any* unreasonably dangerous condition, but to the extent this Court disagrees, it should conclude that the hole was an open and obvious condition specifically known to Ms. Mallett. The superior court’s grant of summary judgment dismissal to Adelphi should be affirmed on this alternate basis.

IV. CONCLUSION

The superior court properly granted summary judgment dismissal to Adelphi because there is a complete failure of proof as to the existence of any duty owed by Adelphi to Ms. Mallett with respect to the hole at

issue in the city sidewalk to say nothing of a complete absence of proximate causation or the fact the hole was an open and obvious condition specifically known to Ms. Mallett. This honorable Court should affirm.

RESPECTFULLY SUBMITTED this 7th day of October, 2013.

Martens + Associates | P.S.

By 

Richard L. Martens, WSBA # 4737

Steven A. Stolle, WSBA #30807

Attorneys for Respondents Adelphi, LLC,
and Smith Family Real Estate, LLC

CERTIFICATE OF SERVICE

I certify that on the day and date indicated below, I caused the foregoing to be filed with the court and served on behalf of respondents Adelphi, LLC, and Smith Family Real Estate, LLC, on the following counsel as indicated below:

Counsel for Appellant Hannalore W. Mallett
Anthony C. Johnson., Esq.
Nelson & Johnson, PLLC
1700 Seventh Avenue, Suite 2210
Seattle, Washington 98101

- U.S. Mail
- Telefax
- Hand Delivery
- Overnight Delivery
- E-mail with Recipient's Approval

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

SIGNED THIS 7th day of October, 2013 at Seattle, Washington.



Matthew Morgan
Paralegal for Martens + Associates | P.S.

2013 OCT -7 PM 11:09
10/7/2013 11:09 AM
10/7/2013 11:09 AM

APPENDIX

A-1 - A-3.....Photographs²

²The attached photographs are identical to Exs. 2, 3, and 4 of the Vanderostyne declaration found at CP 66, 68, and 70; these copies are clearer than those found in the record on appeal due to less photocopying and are provided as a courtesy.







Exhibit 8
Witness Mallett
Date 1/28/13
Roell Realtime Reporting