

66336-4

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NO. 66336-4-1

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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KAREN HATCH, a married woman,

Appellant,

vs.

KING COUNTY, a municipal corporation; and SNOQUALMIE  
VALLEY SCHOOL DISTRICT #410

Respondents.

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SNOQUALMIE VALLEY SCHOOL DISTRICT'S  
BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR .....1

B. STATEMENT OF THE CASE .....1

C. ARGUMENT .....3

    1. Plaintiff alone is responsible for her injuries.....3

        a. Appellant’s attempts to distinguish *Hofstatter* fall  
           short.....4

        b. The Snoqualmie Valley School District did not owe Ms.  
           Hatch a duty.....6

        c. Evidence of subsequent remedial measures is not, and  
           would not, be allowed in this matter.....7

D. CONCLUSION .....8

## TABLE OF AUTHORITIES

### State Cases

<i>Hoffstatter v. Seattle</i> , 105 Wn.App. 596, 20 P.3d 1003 (Div. 1 2001).....	3,4,5,6,7
<i>Hutchins v. 1001 Fourth Avenue Associates</i> , 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).....	3
<i>Meyer v. University of Washington</i> , 105 Wn.2d 847, 852, 719 P.2d 98 (1986).....	7, 8

**A. ASSIGNMENTS OF ERROR**

Appellant assigns error to the trial court's finding that the concrete footer in question was open and obvious.

**B. STATEMENT OF THE CASE**

On December 1<sup>st</sup>, 2006, Plaintiff went to Fall City Elementary School to pick up her son. (CP 77) She was with her son and his friend and she parked in an area behind the school parking lot, where she had not parked prior. (CP 77-78) She walked toward the school, turned back to see her other son, and then tripped. (CP 78-79) She was not looking at her feet. (CP 82) She hit her shin on a piece of cement adjacent to an old sidewalk. (CP 79) The piece of cement was not part of the sidewalk and she did not just hit it on the way down. (CP 80-81) She parked next to the sidewalk and would have been walking across the sidewalk toward the parking lot which would have taken her across the grassy area between the sidewalk and the school parking lot. (CP 70-72)

Will Fogelberg, a supervisor in the County Road Maintenance Department, was the County's CR 30(b)(6) representative for purposes of information concerning the area in question. The facts in this paragraph were taken from his deposition. The area where Hatch fell was adjacent to a County maintained sidewalk, well within the County's right of way adjacent to the school grounds. (CP 70, 88, 90-98) There is no evidence that the school did anything to

the area in question, apart from perhaps mowing the lawn and raking leaves, and, there is no evidence that the school children used the sidewalk in question. (CP 88-89) The cement piece that plaintiff tripped on is most likely a wall footing from a very old fence possibly constructed by the school 70-80 years prior. (CP 87) A meeting was held on 9/11/08 between county representatives and school representatives to decide what to do about the sidewalk area. (CP 97) King County decided to remove the sidewalk as it was clearly on its right-of-way. (CP 97) The issue of removing the wall footing was raised by the school; the county said it would remove the footing but the school would have to pay for it. (CP 98) As part of the process of dealing with the sidewalk and wall footing issue, a survey was conducted by the county to determine the property lines. (CP 90-94) The survey showed that the sidewalk and what is termed a "concrete curb" were well within the county's right of way. (CP 70)

There are three photos identified in Folgelberg's deposition as accurate representations of the sidewalk and curb area prior to the county removing all the concrete. (CP 72-74, 85-86) The photos depict an obvious line of wall footings or a concrete curb, as described in the survey map, along the old sidewalk. The photos also depict the white "X" mentioned in the survey map.

## C. ARGUMENT

### 1. PLAINTIFF ALONE IS RESPONSIBLE FOR HER INJURIES.

To establish a claim of negligence, a plaintiff must show a) that the defendant owed a duty of care to the plaintiff; b) the defendant breached that duty; c) injury to the plaintiff resulted; and d) the defendant's breach was the proximate cause of the injury. *Hutchins v. 1001 Fourth Avenue Associates*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). Plaintiff cannot establish these elements.

The case of *Hoffstatter v. Seattle*, 105 Wn.App. 596, 20 P.3d 1003 (Div. 1 2001) is instructive in the matter at bar. In *Hoffstatter*, the claimant tripped while walking across what was termed a parking strip – an area between a sidewalk and a road. The area was uneven and covered with loose bricks. A parking strip must be maintained in a reasonably safe condition. *Id.*, at 599-600. The court stated:

*In contrast to a sidewalk, which is devoted almost exclusively to pedestrian use, parking strips frequently contain such objects as power and communication poles, utility meters and fire hydrants. As in this case, parking strips frequently are used for beautification, such as grass, shrubbery, trees or other ornamentation. It is certainly true that pedestrian use of parking strips must be anticipated. But they are not sidewalks and cannot be expected to be maintained in the same condition.*

*Id.*, at 600. The area in the case at bar is very similar to the parking strip in *Hoffstatter*. It is on a municipal right of way, adjacent to a sidewalk and is

landscaped. It certainly cannot be considered a sidewalk. The court went on to say:

*In this case, the uneven surface of the bricks was caused by tree roots growing beneath the bricks and dislodging them. It is a common condition in an area set aside for landscaping. Further, the bricks were not hidden, but open and obvious. It is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when walking on a sidewalk. We hold that as a matter of law the uneven surface of the bricks was not unreasonably dangerous.*

*Id.*, at 600-01. (Emphasis added.) Just as in the *Hoffstatter* case, the object plaintiff tripped over was open and obvious. There was a curb-like line of cement running the length of the sidewalk, separating it from the grass area. The “uneven bricks” were not unreasonably dangerous as a matter of law and neither is the obvious concrete curb in the case at bar.

Furthermore, plaintiff stated she was looking back and not watching where she was stepping. As the court in *Hoffstatter* stated, it is reasonable to expect a pedestrian to pay attention to where they are walking when not on a sidewalk. There is no “proximate cause” of plaintiff’s injury.

a. Appellant’s attempts to distinguish *Hofstatter* fall short. First of all, the row of concrete blocks are not on a “pedestrian path” as appellant states. It is an area where pedestrians travel at times, just as the area in *Hofstatter*, but

definitely not a worn or established path. Interestingly, the appellant refers to “scores” of parents using the area. It is not certain where that “fact” came from. However, if that is the case, then what stronger testimony could there be as to the open and obvious nature of this concrete curb? There is no evidence that anybody else had ever failed to negotiate the concrete.

Ms. Hatch argues that *Hofstatter* does not deal with the issue of “distraction.” However, *Hofstatter* is very instructional on the issue – it states that a person walking in an area such as in this case needs to watch where they are walking – “*It is reasonable to expect that a pedestrian will pay closer attention to surface conditions while crossing a landscaped parking strip than when walking on a sidewalk.*” *Hofstatter, supra* at 601.

Plaintiff quoted a human factors expert, Dr. Sloan, essentially, for the proposition, that Ms. Hatch was not watching where she was walking. Dr. Sloan opines that if you are standing next to something and not looking at it, you won’t see it. His testimony does not help. He does not mention that she parked facing the sidewalk and wall footer or that the almost 100 foot long wall footer ran almost the entire length of the sidewalk. It is not reasonable that a person could park their vehicle on a sidewalk, as she did, in front of the curb, and that their eyes would not, at some point, look at where their vehicle is going. Further, the fact that she may have been distracted does not remove her duty to use caution while walking. Plaintiff stated that the district “concedes” that parents would be

distracted by their kids running around. However, the discussion is mischaracterized by counsel. Mr. Schlotfeldt was speaking of the parking lot area and that he was concerned about cars and children in the parking lot. (CP 185) Mr. Schlotfeldt stated that the school children did not use the area in question. (CP 185)

b. The Snoqualmie Valley School District did not owe Ms. Hatch a duty. In the case at bar, the District was not a possessor of the land sufficient to owe any duty to the Plaintiff. The *Hoffstatter* court explained that:

*An owner whose property abuts a public right-of-way may be liable for negligence if he fails to exercise reasonable care when he uses the sidewalk for his own special purposes. But Peck used neither the sidewalk nor the parking strip for any purpose. Hoffstatter argues that occasional replacement of a dislodged brick constitutes a special use. Although Washington case law is silent on the subject, Contreras v. Anderson is persuasive. In Contreras, the court rejected a plaintiff's attempt to hold an abutting property owner liable for her injuries when she fell on a bricked portion of a planting strip. The court held that although an owner who exerts control over city-owned land is liable for dangerous conditions upon it, "neighborly maintenance" in the form of trimming trees, sweeping leaves and gardening does not constitute "control" that would give rise to a duty of care.*

*Id.*, at 602-603. The evidence shows that the only "control" exercised over the area, by the District, was to mow the lawn and maybe rake leaves. "Neighborly

maintenance” does not constitute “control” that would give rise to a duty of care. *Id.* (CP 88-89) The District owed no duty to the Plaintiff.

Appellant makes a curious statement in her brief that “it is undisputed that SVSD owned the land and King County had a right of way over that portion of the premises.” Nowhere in the record is this fact supported. The evidence is clear that the area in question belonged to the County. The survey map does not show an easement or any other property lines indicating that the county merely had a right to cross district property. The county’s representative stated that the property belonged to the county. There were some notes from a meeting wherein it is alleged that the principal thought the property may have belonged to the district. However, the principal was not speaking as a representative for the district and he admitted he wasn’t certain whose property it was. The county had already conducted the survey and knew it was their land.

c. Evidence of subsequent remedial measures is not, and would not, be allowed in this matter. ER 407 would not allow evidence of the removal of the concrete footers after the incident. The rule allows subsequent remedial measures to be admissible in certain situations, but none of them are present in this matter. For purposes of defeating summary judgment, speculation is not allowed. *Meyer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98

(1986). Plaintiff's argument concerning why the concrete was taken out is pure speculation, and the kind of speculation the rule is meant to control.

**D. CONCLUSION.**

Plaintiff failed to watch where she was stepping when leaving a sidewalk. She was not on a maintained area, and she tripped over a very apparent obstacle. There is no evidence of any prior accidents or trips and there was no knowledge of a dangerous situation. Finally, the area is not on District property and it did not owe her a duty.

RESPECTFULLY SUBMITTED March 8th, 2011.

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Dated this 8th day of March, 2011 in Ephrata, Washington.

  
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