

**FILED**

JUL 07 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

**NO. 322301**

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

HARMONY L. A. WHITE, a single woman,  
  
Appellant,

v.

MOSES LAKE SCHOOL DISTRICT NO. 161,  
a Washington State Public School District

Respondent.

---

**REPLY BRIEF OF APPELLANT**

---

KENNETH W. CHADWICK, WSBA #33509  
SCHULTHEIS TABLER WALLACE, PLLC  
Attorneys for Appellant Scott D. Ent  
56 C Street N.W.  
Post Office Box 876  
Ephrata, WA 98823  
(509) 754-5264

**TABLE OF CONTENTS**

**I. INTRODUCTION..... 1**

**II. ARGUMENT/AUTHORITIES ..... 2**

A. IT IS INESCAPABLE THE DISTRICT USED THE SUBJECT SIDEWALK FOR ITS OWN SPECIAL PURPOSE  
2

B. MS. WHITE DOES NOT RELY UPON SPECULATION BUT RATHER UPON FACTS FROM WHICH A REASONABLE JURY COULD INFER THE DISTRICT’S LIABILITY TO HER..... 4

C. THE DISTRICT’S IMPRUDENT ATTACK SUGGESTING MS. WHITE HAS ATTEMPTED TO MISLEAD THE COURT SIMPLY AMPLIFIES THE EXISTENCE OF MATERIAL FACTS PRECLUDING SUMMARY JUDGMENT..... 6

**III. CONCLUSION ..... 13**

**TABLE OF AUTHORITIES**

**Cases**

*Arnold v. Sanstol*, 43 Wn.2d 94 (1953). ..... 4  
*Edmonds v. Pacific Fruit & Produce Co.*, 171 Wash. 590 (1933). ..... 3  
*Hoffstatter v City of Seattle*, 105 Wn.App. 596 (2001). ..... 3  
*Lamphiear v. Skagit Corp.*, 6 Wn.App. 350 (1972)..... 4  
*Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn.App. 731 (2007)..... 3  
State v. Boast, 87 Wash.2d 447, 553 P.2d 1322 (1976) ..... 9  
State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182, 1189 (1985) ..... 9

**Rules**

ER 801 ..... 9  
RAP 2.5..... 9

## I. INTRODUCTION

The Court should deny District's strained effort to avoid liability by disputing its special use of the school's bus drive sidewalk, as the evidence supports no other conclusion than it made special use of the sidewalk. To be fair, though, the District only mildly challenges this assertion.

The District agrees, as it must, that the law imposes two distinct duties upon landowners making special use of abutting sidewalks: a duty not to create unsafe conditions thereon, and a duty to maintain the sidewalks in reasonably safe conditions. But the District effectively shuns the latter duty in denying evidence exists that it breached the duty. Instead, it claims Ms. White relies upon mere speculation. This Court should reject the District's claim.

And the District imprudently attacks Ms. White, claiming her proffered evidence is misleading. Though the facts relied upon by Ms. White are inconvenient to the District's defense, they are not misleading. Further, the District's argument bolsters Ms. White's argument material facts exist to preclude summary judgment and require reversal.

Accordingly, Ms. White requests the Court reverse the trial court's errant dismissal, remanding this matter so she can have her day in court to redress the serious injuries she suffered due the District's negligence.

## II. ARGUMENT/AUTHORITIES

### A. **IT IS INESCAPABLE THE DISTRICT USED THE SUBJECT SIDEWALK FOR ITS OWN SPECIAL PURPOSE**

Despite the District's assertions otherwise (Respondent's Brief at p. 7), there is nothing "usual and customary" about its use of the sidewalk along its school's designated bus drive. It has deliberately and by design used the sidewalk for its own special use.

First, the design of the bus drive establishes the District intentionally put the sidewalk to its own special use. As seen in aerial photographs of the area, the sidewalk has a "cut-out" designed for buses to pull to the sidewalk's curb and unload students in front of the school. (CP 74-75). This design necessarily distinguishes it from other sidewalks designed for usual and customary pedestrian travel, as it is specially designed to accommodate the District's transportation needs.

Second, according to Principal Hendricks, the District "heavily used" the bus drive, which had a "lot of traffic," in 2008 (the time of Ms. White's fall) and prior years. (CP 61).

And third, also according to Principal Hendricks, the bus drive is also routinely used for commercial deliveries by trucks and by parents picking up their children. (CP 67-68).

When considering the design of the bus drive, its substantial use for bus traffic, and its use for other commercial purposes related to operating the school, it is inescapable the District put the abutting sidewalk to its own special use well beyond that of “usual and customary” use for pedestrian travel. It has done so purposefully, by design, and for its benefit.

As such, *the District has* (1) *a duty to* “use reasonable care that the use does *not create conditions rendering [the sidewalk] unsafe* for” pedestrian use, *Stone v. City of Seattle*, 64 Wn.2d 166, 170, 391 P.2d 179 (1964)(emphasis added); and (2) “a corresponding *duty to maintain the walk in a reasonably safe condition* for its usual and customary usage by pedestrians.” *Hoffstatter v City of Seattle*, 105 Wn.App. 596, 601, 20 P.3d 1003 (2001), *citing Edmonds v. Pacific Fruit & Produce Co.*, 171 Wash. 590, 593, 18 P.2d 507 (1933)(emphasis added); *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn.App. 731, 738, 150 P.3d 633 (2007).

Though it has these dual duties, Ms. White notes the District, while acknowledging both duties, focuses almost exclusively on the former, generally ignoring the latter, in denying liability. It does so particularly when erroneously claiming Ms. White relies on speculation and misleads the Court with inconvenient facts for the District.

**B. MS. WHITE DOES NOT RELY UPON SPECULATION BUT RATHER UPON FACTS FROM WHICH A REASONABLE JURY COULD INFER THE DISTRICT'S LIABILITY TO HER**

The District, as it did at the trial court, continues its drum beat that Ms. White's liability claims are based on pure speculation while virtually ignoring the facts and its dual duties.

Ms. White has not offered conclusory statements of fact, as the District argues. Rather, she has provided facts, most of which are not disputed, from which a reasonable jury could reach the conclusion the District either breached its duty not to create an unsafe condition upon the sidewalk or that it failed to maintain the sidewalk in a reasonably safe condition or both. Verdicts do not rest upon speculation when founded on reasonable inferences drawn from circumstantial facts, such as presented by Ms. White. *See Lamphiear v. Skagit Corp.*, 6 Wn.App. 350, 356, 493 P.2d 1018 (1972), *citing Arnold v. Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953).

Twelve facts from which a reasonable jury could infer the District either breached its duty not to create an unsafe condition upon the sidewalk or failed to maintain the sidewalk or both are set forth in Ms. White's opening brief at pages 21 through 22, and for brevity will not be repeated here. That the District knows these facts sufficiently form a basis

for liability not based in speculation is brightly illuminated by its stringent effort to cast the inconvenient facts as misleading.

Further, at page 8 of its briefing, the District asserts Ms. White's claims rely on speculation, because "natural erosion, or other causes" are as likely a cause of her fall as the District damaging the sidewalk. This is an errant statement of Ms. White's claims and an understatement of the District's duties owed. Ms. White's claims rely on facts demonstrating the District breached its duty not to cause the sidewalk to become unsafe and to maintain it in a safe condition. As such, a jury could find for Ms. White if it reasonably inferred from the facts the district breached one or both its duties. As for "natural erosion, or other causes" being the reason for Ms. White's fall, as the District states without any evidence whatsoever, if true that would be consistent with Ms. White's allegation the district failed to maintain the sidewalk in a reasonably safe manner. It would be by no means inconsistent with Ms. White's theory of the case.

Moreover, given testimony by Principal Hendricks the District uses sand and ice melt chemicals on the sidewalks (CP 62), a jury could infer the District's use and maintenance contributed to erosion. Frankly, that the District posits that "natural erosion, or other causes" could have caused Ms. White's fall is a tacit admission it failed to maintain the sidewalk in a reasonably safe condition as it was required to do.

There simply is no basis for the District's claim Ms. White relies upon speculation to demonstrate the District's liability. And the Court should disregard the obfuscation by the District.

**C. THE DISTRICT'S IMPRUDENT ATTACK SUGGESTING MS. WHITE HAS ATTEMPTED TO MISLEAD THE COURT SIMPLY AMPLIFIES THE EXISTENCE OF MATERIAL FACTS PRECLUDING SUMMARY JUDGMENT**

The District is misguided in its attack alleging Ms. White's recitation of the facts is misleading. Nonetheless, its attack does amplify that material facts precluding summary judgment exist.

First, the District asserts Ms. White's quoting Principal Hendricks as stating the District did not "want people slipping and falling" on its sidewalks, (CP 60), misrepresented his testimony, which it claims actually concerned "icy" sidewalks in the winter (Respondent's Brief at p. 8). While it is true Principal Hendricks spoke of winter conditions, he also had just been describing his "daily" observations of the subject sidewalk, noting he parks near the sidewalk:

Q. [Mr. Chadwick] . . . *How often during the school year, I guess, are you at this sidewalk area?* Or maybe it's a daily thing, I don't know.

A. *It is daily.* I don't always walk that sidewalk. But I – *I park, in fact, you can see my pickup in the top left corner of that parking lot* [looking at CP 74].

(CP 59)(emphasis added). And just after talking about not wanting people

to slip and fall, he discussed using “ice melt, and sometimes even sand” on the sidewalk, and that he “hate[d] walking on gravel or any other product that’s on a sidewalk” and would send work orders to have it removed by the District’s maintenance staff. (CP 62-63). Thus, Ms. White’s recitation of Principal Hendrick’s testimony is not misleading. It was simply the most relevant part of his testimony describing the District’s acceptance of its duty to maintain the sidewalk, as it did not “want people to be slipping and falling,” and it having maintenance performed to reduce such occurrences.

Second, the District inexplicably claims Ms. White misleads the Court by providing Principal Hendrick’s testimony “acknowledging that the sidewalk in issue is used for school purposes.” (Respondent’s Brief at p. 9). This is its principal testimony, however inconvenient for the District:

- Q. All right. *So is it fair to say that this bus drive area is regularly used for school purposes?*
- A. *Yes.* Much less now than it was then [2008 and earlier].

(CP 68)(emphasis added). Despite the plain language from its principal’s mouth, the District argues this is misleading, as the sidewalk “is also used for public purposes” unrelated to the school. Though the District offers nothing to explain the scope of this other use, we will assume the sidewalk

is used by pedestrians unrelated to the school, such as Ms. White. But that is of no legal consequence, as the duties owed by landlords making special use of abutting sidewalks assume use of the sidewalks by others. It is axiomatic there would be no need for the express duties if the sidewalks were used exclusively by the abutting landowners.

Moreover, the District's assertion there is no evidence damage to the sidewalk arose from the District's special use of it is nothing but misdirection from the District's second duty—to maintain the sidewalk. Though we would assert there is evidence from which a jury could conclude damage to the sidewalk was caused by the District's special use (busses hitting the curb), the District causing the damage is not necessary for the District to be liable for failing to maintain the sidewalk in a reasonably safe condition while putting it to its own special use.

What is more, nothing in the duty to maintain sidewalks in reasonably safe conditions negates the abutting landlords' duty to do so with respect to damage or defects not caused by landlords. If the duty were so negated, there would necessarily be no need for the corresponding duty, as the duty not to create unsafe conditions on the sidewalks would alone suffice.

The Court should disregard this misdirection by the District under the veil of exposing Ms. White's alleged misrepresentations, which are

non-existent.

Third, the District objects to Ms. White quoting Principal Hendricks' as stating "maybe now the school will clean up the sidewalk." (Respondent's Brief at p. 9-10). Though not asserting Ms. White is attempting to mislead the Court, the District in passing asserts the statement by Principal Hendricks is "hearsay," while involving itself in a battle of meanings between what Ms. Chadwick states she heard Principal Hendricks state after hearing about Ms. White's fall and what Principal Hendricks might have meant or said.

To begin with, the statement is not hearsay, as it is not offered for the truth of the matter asserted. (ER 801(c)). The statement is not offered to prove the District would or would not clean-up the sidewalk. Rather, it is offered to demonstrate the District's prior knowledge the sidewalk needed maintenance so as to remain in a reasonably safe condition for pedestrian use. Moreover, this same evidence was offered at the trial court and the District made no objection on hearsay grounds. Accordingly, even if it were hearsay, which it is not, the District is barred from claiming it is on appeal. *See State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182, 1189 (1985), citing *State v. Boast*, 87 Wash.2d 447, 553 P.2d 1322 (1976); RAP 2.5.

But the District's contortions to avoid Principal Hendricks' statement after hearing of Ms. White's fall acts to illustrate the existing factual disputes in this matter preventing summary judgment. It is exactly this sort of refutation that is within the purview of the jury. In essence, the District is attempting here to have this Court, as the trial court errantly did, weigh the relative meaning of Principal Hendricks' statement versus the veracity of Ms. Chadwick, who heard him speak. The Court should reject the invitation

And fourth, the District again, at page 10 of its brief, claims Ms. White is misleading the Court regarding her recitation of Principal Hendricks' express testimony about the condition of the sidewalk at the relevant time, including its unevenness. To be clear about this, let us look again at Principal Hendricks' testimony after viewing photographs of the relevant portion of the sidewalk taken after the accident and showing gravel and concrete chips strewn about its surface and damaged curbing:

Q. Okay. Can you look at these photographs for a minute and then can you tell me, and this is, you know, your opinion and what you think, whether – and I'm going to tell you these photographs were taken not in 2008, they were taken several months ago.

A. Okay.

Q. But not in 2008. *Can you state whether in your opinion the sidewalks depicted – as depicted in these pictures are in roughly same condition or worse*

*condition as they were in 2008?*

A. Well, what I'm seeing on the Pictures 5 and 6 is places where we did have a contractor come in and try to level the sidewalk. But they basically planed it.

Q. Okay.

A. *It's about the same. I think that – I don't recall that curb looking that bad on Pictures No. 4. But approximately the same.*

(CP 65-66)(emphasis added). And then after explaining about the District's 2006 sidewalk leveling project, discussed at page 11 of the District's briefing, Principal Hendricks notes there continues to be "sunken areas" in the relevant portion of the subject sidewalk

Q. Okay. So when you say uneven sidewalks, if you look at *Picture Nos. – No. 3, where there's a depression there, is that kind of what you're talking about?*

A. Actually –

Q. Or --

A. *-- in that same picture, No 3, can you see an area where the concrete surface has – has been shaved down.*

Q. Okay.

A. *That would be a sample of the of the abrasion technique that the use to level the sidewalk.*

Q. Okay.

A. There was – that was the focus of the remedy to – to level them.

Q. Okay.

A. *I think that we still have a few places where because of the weather and whatever else there may be sunken areas.*

Q. Okay. Is that kind of like – well, you know, *like as in 3, for example, of a break and just a chunk that just sinks in farther*, is that what you're talking about?

A. *Yeah.*

Q. Okay. Okay.

A. *We have a few places where we have used red paint.*

Q. Okay.

A. *To highlight it. This should have been red painted. We missed it.*

(CP 69-70)(emphasis added). So contrary to the District's briefing, the sunken, uneven areas Principal Hendricks testified about did not concern conditions in 2006 when the District undertook leveling maintenance but were conditions existing in the photographs he examined and identified as depicting the sidewalk in "about the same" condition as when Ms. White fell in 2008. Again, the District's contortions to avoid the plain testimony of its principal only punctuates existing material facts that preclude summary judgment.

In short, Ms. White has not misrepresented any fact to this Court, despite the District asserting otherwise. But in so errantly alleging, the District has bolstered Ms. White's argument that questions of material fact exist to preclude summary judgment.

### III. CONCLUSION

The District used the sidewalk along its specially designed bus drive for its special purpose to transport students to school, to accept commercial truck deliveries, and to allow parents to retrieve their children from school. These are uncontroverted facts. As such, this Court should find the District owes Ms. White a duty to not create unsafe conditions upon the sidewalk and a duty to maintain the sidewalk in a reasonably safe condition for pedestrian travel.

Despite the District attacking Ms. White by claiming wrongly that she attempted to mislead this Court. Despite the District shunning its duty to maintain the abutting sidewalk along its specially designed bus drive. And despite the District alleging Ms. White's claims are based on mere speculation. The District's response provides no reason for this Court not to reverse the trial court's dismissal of Ms. White's claims against it.

The trial court errantly invaded the province of the jury by determining factual issues against Ms. White. It did so despite there being at least 12 identifiable facts from which a reasonable jury could infer the District breached its duty to not create unsafe conditions upon the subject sidewalk, breached its duty to maintain the sidewalk in a reasonably safe condition, or both. However obliquely, the District invites this Court to do

the same, particularly when attempting to argue the meaning of deposition testimony in a misguided effort to impugn Ms. White's veracity to this Court.

Accordingly, Ms. White respectfully requests this Court reverse the trial court and remand this matter to allow Ms. White an opportunity to recover for the significant, permanent injuries caused her by the District's negligence.

DATED this 1<sup>st</sup> of July, 2014.

SCHULTHEIS TABLER WALLACE, PLLC

By: 

Kenneth W. Chadwick, WSBA 33509  
Attorney for Ms. Harmony L. A. White  
56 C Street N.W.  
P. O. Box 876  
Ephrata, WA 98823  
Phone: 509-754-5264