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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.

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a reasonably common negligence claim by Appellant Harmony L. A. White, against Respondent Moses Lake School District No. 161 (the “District”), arising from the District’s special use of a sidewalk abutting the District’s school property, which sidewalk it used as its school bus drive for loading and unloading students, as well as for other school purposes.

As in any negligence action, Ms. White is required to prove the District owed her a duty, the District breached the duty, the District’s breach of its duty proximately caused her injury, and she suffered damages. And while the existence of the duty is properly determined, as a matter of law, by the court, the determination of breach, proximate cause, and damages are nearly always issues reserved for jury. Only when the undisputed facts could lead to but one conclusion on those negligence elements is the court permitted to decide them.

Property owners do not commonly owe duties to pedestrians concerning the condition and safety of sidewalks abutting their property, but when they make special use of the abutting sidewalk they are burdened by those duties. Ms. White alleges the District’s use of the sidewalk as its bus drive was a special use of the sidewalk, burdening the District with duties to use reasonable care to not create conditions on the sidewalk that

made it unsafe for pedestrian use and to maintain the sidewalk in a safe manner for pedestrian use. The District rejects the assertion, asserting it has no duty with respect to the sidewalk. Despite the District's assertion, the trial court found such duties existed. With this decision, Ms. White assigns no error.

But while finding the duties existed, the trial court then invaded the province of the jury and decided issues of material fact as to breach and proximate cause and dismissed Ms. White's action against the District. With this decision, Ms. White assigns error.

Accordingly, Ms. White respectfully requests this Court affirm the trial court's decision with respect to the existence of the duties owed her by the District and reverse the trial court with respect to its deciding issues of material fact reserved for the jury and dismissing her lawsuit.

II. ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING DISMISSAL OF MS. WHITE'S LAWSUIT ON THE DISTRICT'S MOTION FOR SUMMARY JUDGMENT

III. ISSUES

- A. Whether the trial court correctly determined the District, as the property owner abutting the subject sidewalk, owed duties to Ms. White not to create unsafe conditions thereon and to**

maintain the sidewalk in a reasonably safe condition?

- B. Whether the trial court erred in dismissing Ms. White's lawsuit where genuine issues of material fact exist to allow a reasonable jury to conclude the District breached its duties owed her and that its breach proximately caused Ms. White injury?**

IV. STATEMENT OF THE CASE

A. FACTS CONCERNING MS. WHITE'S FALL AND INJURIES

On May 24, 2008 at about 7:30 p.m., Appellant Harmony L. A. White arrived at the First Presbyterian Church located across South C Street from Respondent Moses Lake School District's Midway Learning Center ("School"), which is located at 502 South C Street in Moses Lake, Washington. (CP 91). Ms. White was at the time president of Grant County Animal Outreach, which operates the Moses Lake Animal Shelter, and she had donated her vehicle to the shelter for use in the Moses Lake Spring Fest Moonlight Parade. (CP 92).

Ms. White, along with her family and friends, decorated her vehicle and dressed her daughter in a dog costume in preparation for the parade. (CP 92, 49-50, 54). Portable toilets were located on a sidewalk along South C Street adjacent to the School. (CP 50-52, 54). Ms. White

decided to use one of them before the parade began, and she and a shelter volunteer crossed South C Street to the toilets. (CP 50). As she stepped onto the sidewalk and went toward the toilets, Ms. White slipped on the sidewalk on what she described felt “like marbles,” immediately slid unable to catch herself, and fell on the sidewalk as she was turning toward the portable toilets. (CP 52-54).

Emergency medical personnel from the Moses Lake Fire Department arrived at the School to aid Ms. White. (CP 92). She complained of pain in her jaw. (CP 92). Her left side lower lip was cut and swelling, her chin was scraped, and she had abrasions along her left outer thigh and left knee. (CP 92). Ms. White was conscious but was in great pain. (CP 92). Emergency personnel placed her in a cervical collar, placed her on a backboard, and transported her by ambulance to Samaritan Hospital in Moses Lake. (CP 92).

Subsequently, Ms. White underwent multiple reconstructive surgeries to her face, but she faces yet further surgery to better recover from the serious injuries she suffered in the fall. (CP 92).

B. FACTS CONCERNING THE DISTRICT’S USE OF THE SIDEWALK

The sidewalk on which Ms. White fell follows along South C Street adjacent to the School. (CP 54). Chris Hendricks, the School’s

principal, testified the School uses the sidewalk as its “bus drive area.” (CP 58-59, 74-75).¹ Principal Hendricks further testified the bus drive area was heavily used in 2008, and that he was particularly careful about its maintenance, because the District did not “want people slipping and falling on [its] sidewalks:”

Q. [Mr. Chadwick] And is that because this [the sidewalk along the bus drive] is where you’ve got all the bus and the kids and so forth on that sidewalk right below me?

A. Well, it – it used to be even more heavily trafficked than it is now, we would have several busses coming, dropping off kids in the old Discover days, 2008.

Q. Right.

A. Now we’ve only got one bus picking up kids because most of our kids are walkers.

Q. So this was heavily used in 2008 and the years prior but not so much now?

A. There was a lot of traffic, yes.

Q. Okay. Okay. And so that’s why you were particularly careful about –

A. Right. We don’t want – we don’t want people slipping and falling on our sidewalks.

(CP 60-61). Principal Hendricks went on to testify the bus drive area was also used by parents of students and trucks delivering materials to the School, and that it was “regularly used for school purposes” at the time of

¹The trial court was provided color copies of CP 74-75, but the Clerk’s Papers were transmitted in black and white. For the court’s convenience and to provide a more descriptive version of the evidence that was before the trial court, Appellant has attached color copies of CP 74-75 as Appendix A hereto.

Ms. White's fall:

Q. Right. So what kind of functions do you have for the school where parents would park there [the bus drive]?

A. Well, it would be typically a situation during the noon hour where, for example, morning kindergarten students who don't get bus transportation home are picked up by the parents. Because that's not a time when we're loading buses in that area, we'll occasionally have parents come in and park there.

Q. Okay.

A. And they're not really supposed to, but it's just a quick stop.

Q. You don't run out there and throw them out?

A. No.

* * *

A. But, most often it would be bus or truck traffic. Another – another occasion might be a truck delivering material, they'll occasionally park along that spot and then find out where they should deliver to.

* * *

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 67-68).

C. FACTS CONCERNING THE UNSAFE CONDITION OF THE SIDEWALK

The Monday morning following Ms. White's fall, Linda Chadwick, who was then a secretary to Principal Hendricks, was in the School's office and learned of the fall. (CP 82-83). Ms. Chadwick

testified a “parent came in and said that somebody had taken a really bad spill and had to be taken away in an ambulance.” (CP 83). She further testified that Principal Hendricks, after hearing the parent’s report, commented that perhaps the District’s maintenance staff would then clean up the sidewalk:

Q. [Mr. Christensen] Okay. And do you recall did anybody say anything else to her [the parent], was there discussion about this fall?

A. Only the fact that the principal said that perhaps now that they will clean up the sidewalk.

* * *

Q. Okay. And do as best you can, do you remember the exact words the principal used?

A. No, just something to the effect of perhaps maybe now that the maintenance people and staff might come over now and clean up the sidewalks and take care of it.

Q. Did they say clean up or take care of it?

A. Or something to that effect, that now basically the situation would be fixed perhaps.

(CP 83-84).

Principal Hendricks did not deny he made the statement Ms.

Chadwick attributed to him:

Q. Okay. So, if somebody were to say that they heard you say after . . . hearing about the fall that maybe then the maintenance staff will take care of the problem, would you deny making that statement?

A. I would say that it would be extremely unlikely that by May 24th that problem wouldn’t have been ameliorated.

Q. But had it not been taken care of by then, is making that statement inconsistent with what you would have wanted to have happen?

A. No.

Q. So can you deny that you made that statement?

A. I would not deny making a statement, something like that.

(CP 63-64).

Further, Principal Hendricks examined photographs of the subject sidewalk being covered in loose cement pieces or gravel type material and testified the photographs depicted the sidewalk in “about the same” condition as in 2008 when Ms. White slipped on the sidewalk:

Q. Mr. Hendricks, you’ve been given exhibit labeled No. 2 by the court reporter.

A. Yes.

Q. It consists of three pages with six photographs numbered 1 through 6.

Is that what you have?

A. Yes.

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 at 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, 76-78).²

Principal Hendricks' provided a basis for his knowledge of the subject sidewalk's condition, testifying he made daily inspections of the subject sidewalk and directed staff to remedy unsafe conditions he discovered:

Q. . . . Mr. Hendricks, what you've been given marked Exhibit No. 1 by the court reporter are some – there's two pages.

Do you see there's – these are aerial photographs –

* * *

Q. Along the C Street, it's the bus drive area.

A. Yeah, right.

* * *

Q. . . . 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 even see my pickup in the top left corner of that parking lot.

Q. Is this on the first page?

A. Yeah. This would be me.

²The trial court was provided color copies of CP 74-75, but the Clerk's Papers were transmitted in black and white. For the court's convenience and to provide a more descriptive version of the evidence that was before the trial court, Appellant has attached color copies of CP 76-78 as Appendix B hereto.

- Q. Okay.
A. That's my parking spot. I don't have it labeled but –
- Q. Could you circle that and write down your truck?
A. (witness complies.) Now, that is where I will typically park, so I do get a look at – at least that immediate portion of that C Street sidewalk. And I also walk on that main sidewalk that goes into the building.
- Q. Okay.
A. Part of the reason I do that is so that if I slip I can go right in and say, Gordy, through some ice melt.
- Q. Okay.
A. This morning I – I followed that routine, he had ice melt down, so –
- * * *
- A. – that would be a real good example of a – of a typical daily protocol that I follow.

(CP 58-60).

Moreover, Principal Hendricks testified that despite his having “nagged really hard” to address uneven sidewalks at the School and repairs having been made, the unevenness continued to exist with breaks in the surface concrete:

- Q. Okay. Now according to discovery responses provided by the district, it states that they had a --- the district had a district wide effort to work on potential sidewalk hazards.
Were you part of that effort?
- A. I was one of the people that nagged really hard that we had uneven sidewalks.
- Q. Okay. So when you say uneven sidewalks, if you look at Pictures 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, you can see an area where the concrete surface has – has been shaved down.

Q. Okay.

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

Q. Okay.

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

Q. Okay.

A. I think 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 just sinks farther, is that what you're talking about?

A. Yeah.

(CP 69-70, 77).

Principal Hendricks agreed buses have “bumped into the curb” when pulling into the bus drive area, and that black marks along the curb of the sidewalk could have been caused by buses or parent’s cars:

Q. Okay. Thank you.

When you've been out there and seen the buses coming in and so forth, have you ever seen the buses bump into the curb as they're parked, pulling up with the tires?

A. Well, I'm sure that has happened.

Q. Okay. Could you look at No. 4 picture of the Exhibit 2?

You see that black strip along the top of the curb line?

A. Uh-huh.

Q. Would that be kind of consistent with a tire mark you might see after a bus struck the curb, bumped into it:

A. It could be.

Q. Okay.

A. We also occasionally have functions where parents will park in there.

Q. Okay.

A. Tires are tires.

(CP 66-67, 77).

The District's Transportation Manager, John Eschenbacher, who is in charge of all bus and transportations operations for the District, supported Principal Hendricks' testimony that busses sometimes bump the curb when picking up students:

Q. [Mr. Chadwick] What positions have you held with the district since 1992?

A. Just transportation manager.

* * *

Q. . . . Generally, what are your duties as a transportation manager?

A. Basically, I'm responsible for all – make sure all the routing's there and the buses are running on time, people are – you know, we have adequate staff to run the buses, that we maintain the buses, anything to deal with transportation it's mine.

* * *

Q. Okay. Do you ever see the buses bump the curb just

- in the regular course of picking up kids?
A. It does happen.

(CP 88-90).

D. RELEVANT PROCEDURAL HISTORY

On May 23, 2011, Ms. White filed her Verified Complaint for Money Damages against the District in the Grant County Superior Court. (CP 1-8).

On June 28, 2013, the District filed its Motion for Summary Judgment, seeking to dismiss Ms. White's Complaint. (CP 9).

On October 3, 2013, the trial court wrote Ms. White's and the District's respective counsel, providing a narrative basis for its decision to grant the District's Motion for Summary Judgment and requesting the parties submit a proposed order in accord with the court's narrative decision. (CP 138-39).

On November 7, 2013, the trial court entered its Order Granting the District's Motion for Summary Judgment. (CP 140-42)

On November 14, 2013, Ms. White filed her timely Motion for Reconsideration, requesting the trial court reconsider its decision, citing two errors: that the court objectively misconstrued Ms. White's proffered evidence, and that it improperly invaded the province of the jury by deciding material issues of fact concerning breach and proximate cause.

(CP 145-46).

On January 22, 2014, the trial court entered its Order Denying [Ms. White's] Motion for Reconsideration. (CP 204-05).

And on February 3, 2014, Ms. White timely filed a Notice of Appeal to this Court, seeking review of the trial court's November 7, 2013 and January 22, 2014 orders. (CP 207-08).

V. ARGUMENT/AUTHORITIES

A. STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003), quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). As such, the appellate court considers all the facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Robinson v. City of Seattle*, 119 Wn.2d 34, 57, 830 P.2d 318, 332 (1992), citing *Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990). Accordingly, summary judgment is only appropriate:

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law.

Robinson, 119 Wn.2d at 57, *citing* CR 56(c).

B. THE TRIAL COURT CORRECTLY DETERMINED THE DISTRICT, AS THE PROPERTY OWNER ABUTTING THE SUBJECT SIDEWALK, OWED DUTIES TO MS. WHITE NOT TO CREATE UNSAFE CONDITIONS THEREON AND TO MAINTAIN THE SIDEWALK IN A REASONABLY SAFE CONDITION

Although the trial court ultimately erred in granting summary judgment dismissal of Ms. White's claims against the District, it correctly concluded the District, as the property owner abutting the subject sidewalk, owed Ms. White duties not to create unsafe conditions thereon and to maintain the sidewalk in a reasonably safe condition.

To prevail on a claim of negligence, a plaintiff must demonstrate (1) the defendant owed her a duty; (2) the defendant breached that duty; (3) she was injured; and (4) the defendant's breach was the proximate cause of her injury. *See Doty-Fielding v. Town of South Prairie*, 143 Wn.App. 559, 563, 178 P.3d 1054 (2008), *citing Hoffstatter v City of Seattle*, 105 Wn.App. 596, 599, 20 P.3d 1003 (2001). Whether defendants owe duties of care to plaintiffs is a question of law. *Doty-Fielding*, 142 Wn.App. at 563, *citing Hoffstatter*, 105 Wn.App. at 601. But whether defendants breach duties owed and whether their breaches proximately injure plaintiffs are questions of fact reserved for the jury. *Hertog, ex rel.*

S.A.H. v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999), citing *Sherman v. State*, 128 Wn.2d 168, 183, 905 P.2d 355 (1995).

The Supreme Court of Washington's decision in *Stone v. City of Seattle*, 64 Wn.2d 166, 391 P.2d 179 (1964), illustrates an abutting property owner's duty owed to pedestrians like Ms. White. *Stone* concerned an action by a plaintiff against the City of Seattle and owners of an apartment house that abutted a city sidewalk. *Id.* at 167. There were tenant parking spaces on the apartment house owner's property, and there was evidence some tenants had driven over the sidewalk to reach their parking spaces. *Id.* at 168. The plaintiff fell in a hole in the sidewalk in front of the apartment complex and was injured. *Id.* at 167. The trial court entered a directed verdict against the City and denied the apartment house owner's motion to dismiss, and a jury returned a verdict for the plaintiff against the apartment house owners. *Id.* at 168-69.

On appeal, the apartment house owners contended the trial court had errantly instructed the jury with respect to their duties owed the plaintiff as abutting property owners. *Stone*, 64 Wn.2d at 168-9. In denying the apartment owners' claims of error, the court set forth the applicable law concerning property owners' duties when using abutting sidewalks for their own special purpose:

An *abutting owner* is not an insurer of pedestrians, but he ***must exercise reasonable care when he uses the sidewalk for his own special purposes.*** *Collais v. Buck & Bowers Oil Co.*, 175 Wash. 263, 27 P.2d 118 (1933); *Edmonds v. Pacific Fruit & Produce Co.*, 171 Wash. 590, 18 P.2d 507 (1933). In *James v. Burchett*, 15 Wash.2d 119, 129 P.2d 790 (1942), we said:

‘Where a sidewalk is used by one, in control of abutting property, as a driveway for vehicles, the special use, though lawful, carries with it the duty to use reasonable care that the use does not create conditions rendering it unsafe for the passing thereon of pedestrians. * * *

(emphasis added). *Stone*, 64 Wn.2d at 170.

And in addition to not creating an unsafe condition upon the sidewalk, property owners who use abutting sidewalks for their own special use owe “a corresponding duty to maintain the walk in a reasonably safe condition for its usual and customary usage by pedestrians.” *Hoffstatter*, 105 Wn.App. at 601, *citing Edmonds*, 171 Wash. at 593; *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn.App. 731, 738, 150 P.3d 633 (2007).

Accordingly, courts in Washington have consistently held abutting property owners liable in negligence when they have used the abutting sidewalks for their own special purposes: *James*, 15 Wn.2d at 129 (defendant was liable for allowing gravel from its car lot to be carried onto the sidewalk); *Edmonds*, 171 Wn. at 590 (defendant’s heavy trucks

damaged the sidewalk by using it as a driveway); *Groves v. City of Tacoma*, 55 Wn.App. 330, 332, 777 P.2d 566 (1989) (defendant's business invitees damaged the sidewalk by driving over it). In each of these cases, the defendant abutting property owners were held liable for a pedestrian's injuries because their special use of the sidewalk caused dangerous conditions thereon. *See Seiber*, 136 Wn.App. at 739.

Given the facts in this matter and the applicable law, the trial court correctly determined the District owed Ms. White duties not to cause or maintain a defect in the abutting sidewalk. (CP 138).

Here, the uncontroverted evidence demonstrates the District used the abutting sidewalk upon which Ms. White fell for its own special purpose in operating the School: (1) the abutting sidewalk construction is such to specially create a "bus drive area" in front of the school along S. C Street (CP 58-59, 74-75); (2) it used the abutting sidewalk heavily for its bus drive in 2008 when Ms. White fell (CP 61); and (3) it used the abutting sidewalk specifically for school related operations, including for loading and unloading students driven to school by the District's school buses, for loading and unloading students driven to school by parents, and for commercial deliveries. (CP 61, 67-68).

Further, while the District's school is not a "business" but a public facility, the District's special use of the bus drive benefitted it exclusively

in the operation of its school. As such, and like the defendant in *Stone*, the District made “special use on part of the property, out of which [it] profited” and made “some gain.” See *Stone*, 64 Wn.2d at 169. This “gain” derived through special use of the abutting sidewalk, though only obliquely stated in *Stone*, provides an economic policy basis for holding defendants, like the District, liable for creating unsafe conditions upon abutting sidewalks or failing to maintain sidewalks in reasonably safe conditions.

The burden of assuming these duties to plaintiffs, like Ms. White, is a product of abutting property owners having used what would otherwise be a public land conveyance for pedestrians for their own gain. In that respect, there is an economic offset in exchange for defendants, like the District, not having undertaken the financial burden of constructing a necessary facility to carry on their businesses (i.e., the District not having undertaken the financial burden of constructing a bus drive area on its own property rather than using a bus specifically designed cutout along a public street and sidewalk).

In sum, the District’s special use of the subject sidewalk as its bus drive created for it duties to use reasonable care in not creating a condition rendering pedestrian travel on the sidewalk unsafe and to maintain the sidewalk in a reasonably safe condition. In this case, it owed those duties

to Ms. White.

C. THE TRIAL COURT ERRED IN DISMISSING MS. WHITE'S COMPLAINT, BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST TO ALLOW A REASONABLE JURY TO CONCLUDE THE DISTRICT BREACHED ITS DUTIES OWED HER AND THAT ITS BREACH PROXIMATELY CAUSED MS. WHITE INJURY

Despite there being more than a dozen indented, admissible pieces of evidence before the trial court, creating genuine issues of material fact from which a reasonable jury could conclude the District breached its duties owed Ms. White and that its breach proximately caused her injury, the trial court errantly dismissed Ms. White's Complaint.

The Supreme Court of Washington's decision in *Ruff v. Cnty. of King*, 125 Wn.2d 697, 887 P.2d 886 (1995) is instructive. In *Ruff*, the Court stated plainly that an appellate court must take the position of the trial court and *assume facts most favorable to the nonmoving party*. *Ruff*, 125 Wn.2d at 703, citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985), *Braegelmann v. Cnty. of Snohomish*, 53 Wn.App. 381, 383, 766 P.2d 1137, review denied, 112 Wash.2d 1020 (1989). Moreover, it clearly stated that *issues of negligence and proximate cause are generally not susceptible to summary judgment*. *Ruff*, 125 Wash. at 703, citing *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975), *Ferrin v. Donnellefeld*, 74 Wash.2d 283, 444 P.2d 701 (1968), and *Wojcik v.*

Chrysler Corp., 50 Wn.App. 849, 751 P.2d 854 (1988). And *only* “*when reasonable minds could reach but one conclusion, [may] questions of fact may be determined as a matter of law.*” *Ruff*, 125 Wash. at 703-04, quoting *Hartley*, 103 Wn.2d at 775 (emphasis added).

In a nutshell, Ms. White’s theory of negligence liability against the District is that the District breached duties owed Ms. Whites by causing and/or maintaining a defect on the surface of the subject sidewalk through use of the sidewalk as its bus drive area, resulting in concrete chips and gravel being strewn onto, and remaining on, the sidewalk. And the existence of the concrete chips and gravel were the proximate cause of Ms. White’s fall on the sidewalk.

The following facts are properly before the court:

- *Ms. White* testified she stepped on the sidewalk and *slipped on what felt “like marbles”* (CP 53);
- Principal Hendricks testified *the sidewalk was used as a “bus drive area”* (CP 59);
- Principal Hendricks testified the *bus drive area was heavily used in 2008*, the period when Ms. White fell (CP 61);
- Principal Hendricks testified the *bus drive area was also used by parents of students and trucks delivering materials to the school, and that it was “regularly used for school purposes”* at the time of Ms. White’s fall (CP 67-68);
- Linda Chadwick, Principal Hendricks’ secretary at the time of Ms. White’s fall, testified a student’s *“parent came in and said that somebody had taken a really bad spill and*

had to be taken away in an ambulance,” and that upon hearing the parent’s comment, Principal Hendricks commented that “perhaps now that [the District’s maintenance staff] will clean up the sidewalk” (CP 82-84);

- *Principal Hendricks did not deny making the statement Ms. Chadwick attributed to him (CP 63-64);*
- *Concerning photographs of the subject sidewalk showing it covered in loose cement pieces or gravel type material, Principal Hendricks testified the photographs depicted the sidewalk in “about the same” condition as in 2008 when Ms. White slipped on the sidewalk (CP 65-66);*
- *Principal Hendricks testified that despite his having “nagged really hard” to address sidewalks, and repairs having been made to the sidewalks, they remain uneven with breaks in the concrete surface. (CP 69-70,77)*
- *Principal Hendricks conducted daily inspections of the subject sidewalk and directed staff to maintain them when finding safety concerns. (CP 58-60);*
- *Principal Hendricks testified he agreed buses have “bumped into the curb” when pulling into the bus drive area (CP 66);*
- *Concerning photographs of the subject sidewalk’s curb, Principal Hendricks testified black marks along the curb of the sidewalk could have been caused by buses or parent’s cars (CP 66-67); and*
- *Defendant’s Transportation Manager, John Eschenbacher’s testimony supported Principal Hendrick’s position buses sometimes bump the curb when picking up students (CP 90).*

These admissible facts, most of which are wholly uncontroverted, support the existence of genuine issues of material fact concerning

whether the District breached its duties owed Ms. White and whether its breach was the proximate cause of Ms. White's fall and injuries.

For example, a jury could reasonably conclude the District breached its duty to use reasonable care to not create conditions on the sidewalk that made it unsafe for pedestrian use, finding the curbing of the bus drive sidewalk was damaged by the District's busses and student's parent's vehicles striking it when transporting students to and from the school and from commercial trucks using the bus drive to make deliveries to the School. The jury so could conclude, *inter alia*, from Principal Hendricks' testimony the District's busses strike the sidewalk's curbing, and that parents use the bus drive, as do commercial delivery trucks; the District's Transportation Manager, John Eschenbacher's, testimony supporting Principal Hendricks' testimony busses strike the curbing; and photographs showing gravel/cement chips on the surface of the sidewalk and other damage to the surface of the sidewalk and its curbing, which Principal Hendricks testified depicted the sidewalks in "about the same" condition as in 2008 when Ms. White fell.

A jury could also reasonably conclude the District failed to maintain the sidewalk in a safe manner for pedestrian use. It could so conclude, *inter alia*, from Ms. White's testimony she fell after slipping on what felt like "marbles;" and the photographs showing gravel/cement

chips on the surface of the sidewalk and other damage to the surface of the sidewalk and its curbing, which Principal Hendricks testified depicted the sidewalks in “about the same” condition as in 2008 when Ms. White fell.

Likewise, a jury could reasonably find the District knew, or should have known, of unsafe conditions on the subject sidewalk but failed to maintain the sidewalk in a safe condition for pedestrian use. A jury could so conclude, *inter alia*, from Ms. Chadwick’s testimony that upon hearing a person had fallen and been taken by ambulance from the school, Principal Hendricks commented that “perhaps now that [the District’s maintenance staff] will clean up the sidewalk,” a statement Principal Hendricks does not deny making; and Principal Hendricks’ testimony that he inspected the sidewalk daily and requested staff address unsafe conditions he found around the time of Ms. White’s fall.

And a jury could reasonably conclude the District’s breach of its duties to use reasonable care to not create conditions on the sidewalk making it unsafe for pedestrian use and to maintain the sidewalk in a safe manner for pedestrian use proximately caused Ms. White’s injuries. It could so find, *inter alia*, from Ms. White’s uncontroverted testimony that she fell after slipping on what felt like “marbles.”

Further, though Ms. White claims she slipped on what felt like “marbles,” a jury could conclude the sidewalks’ admittedly uneven

damaged surface further contributed to Ms. White's fall where gravel/cement chips on the surface of the sidewalk, other damages, and unevenness are shown in the photographs Principal Hendricks testified depicted the sidewalk in "about the same" condition as in 2008 when Ms. White fell.

Moreover, given this Court must consider all facts in a light most favorable to Ms. White, it becomes even more inescapable that genuine issues of material fact exist, precluding summary judgment.

Ms. White grants that the District will dispute what conclusions a jury could or should make from the evidence before the Court. And she further grants that a jury may not agree with her argument as to what conclusions it should make with respect to the District breaching duties owed her and whether its breaches proximately cause her injuries. But that is the essence of Ms. White's appeal and assignment of error in her appeal: these factual disputes concerning breach and proximate cause are properly left to the jury to decide. Not the trial court. And not this Court.

VI. CONCLUSION

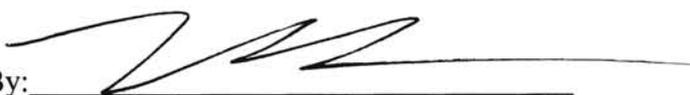
Ms. White sued the District in negligence, claiming she fell on a sidewalk abutting the District's property, which fall caused her serious injuries, requiring multiple surgeries and yet more surgeries to be required in the future.

The trial court granted the District's motion for summary judgment and dismissed Ms. White's Complaint. In doing so, it correctly concluded the District, as an abutting property owner, owed Ms. White duties to use reasonable care to not create conditions on the sidewalk that made it unsafe for pedestrian use and to maintain the sidewalk in a safe manner for pedestrian use. But the trial court erred when it invaded the province of the jury and decided, as a matter of law, that the District neither breached its duties nor proximately caused her injuries. It did so despite a plethora of admissible, nearly entirely uncontroverted evidence from which a reasonable jury could find Responded did breach its duties and did proximately cause Ms. White's injuries.

Therefore, Ms. White respectfully requests that the Court affirm the trial court's finding that the District owed her duties and reverse its order dismissing her lawsuit based on an errant legal finding the District neither breached its duties nor proximately caused her injuries

DATED this 21st day of May, 2014.

SCHULTHEIS TABLER WALLACE, PLLC

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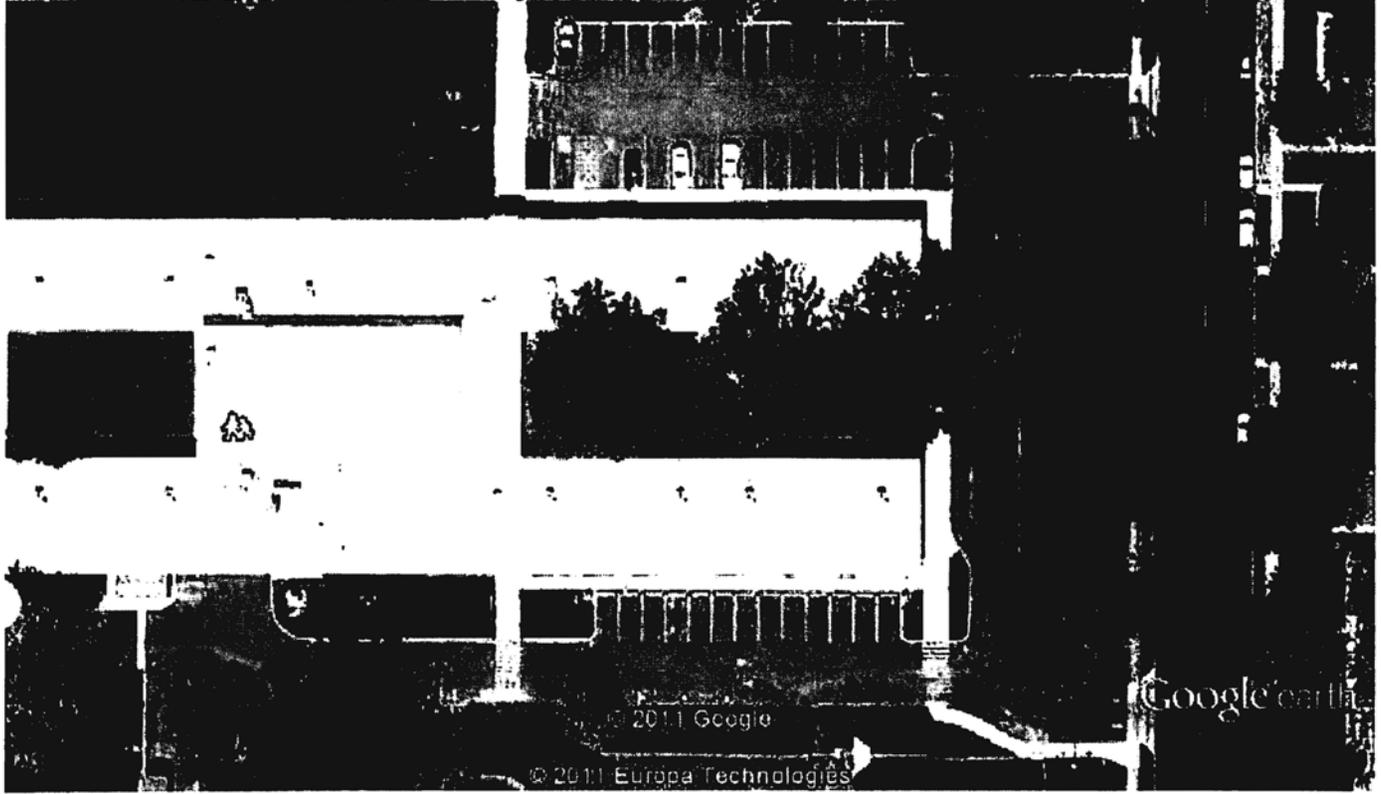
Ephrata, WA 98823
Phone: 509-754-5264

APPENDIX A

502 S C St, Moses Lake, WA 98837

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CH 11/11/11



Google earth

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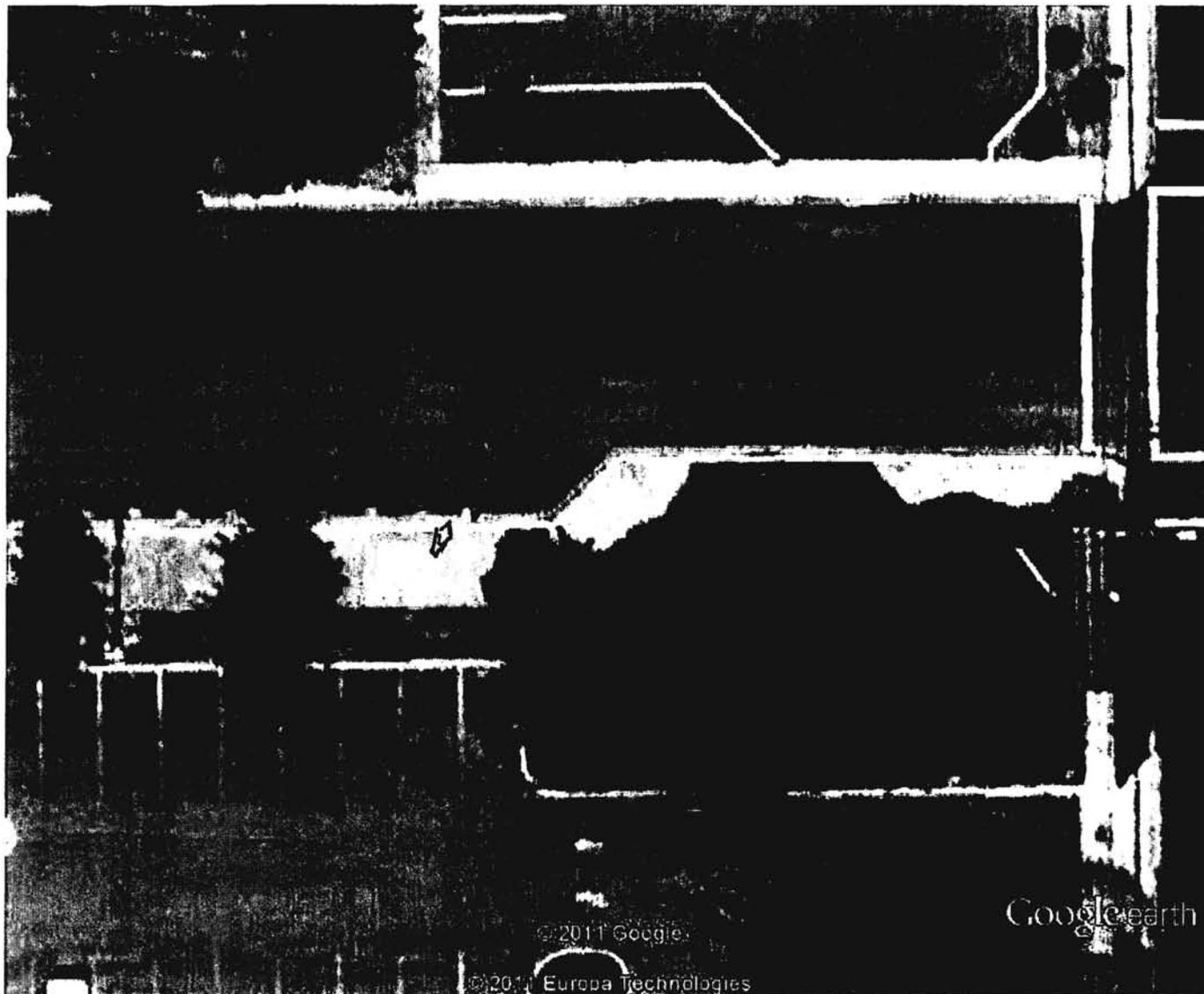
Google earth

feet
meters



00074

EXHIBIT NO.	1
DATE	12-8-11
WITNESS	LOSE
SUSAN E. ANDERSON REGISTERED PROFESSIONAL REPORTER	



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Google earth

Google earth

feet
meters



APPENDIX B



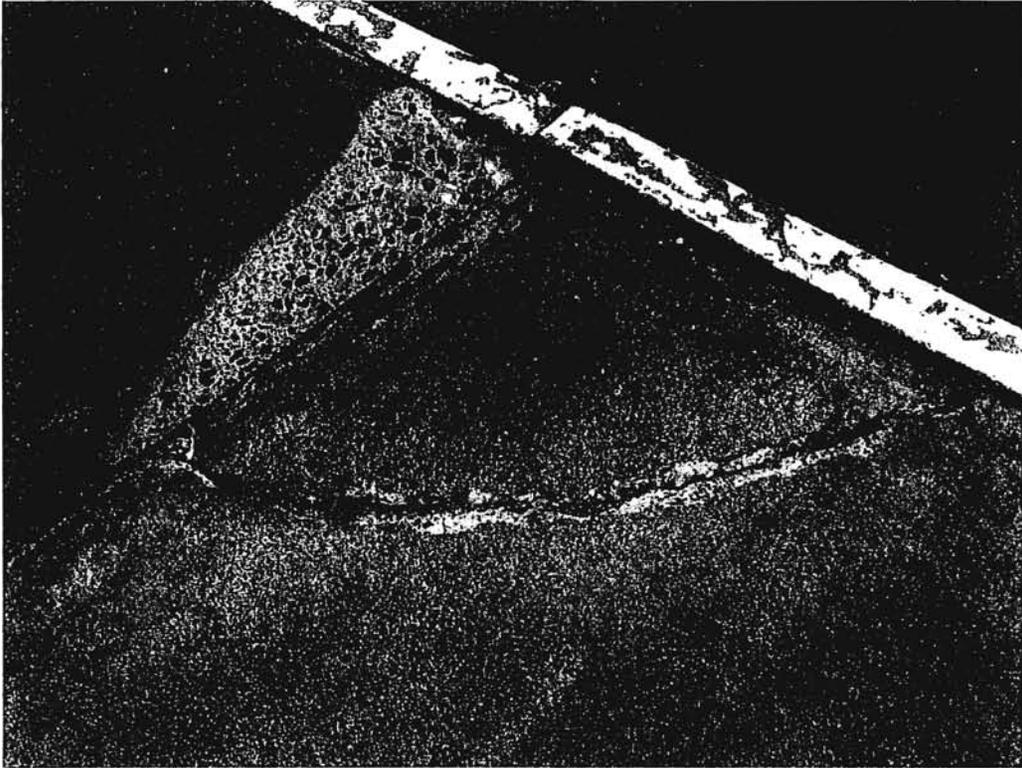
1



2

00076

EXHIBIT NO.	2
DATE	12-5-11
WITNESS	Rose
SUSAN E. ANDERSON REGISTERED PROFESSIONAL REPORTER	



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