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No. 69623-8-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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DAVID CHRISTMAN AND ROBIN CHRISTMAN,  
individually, and as husband and wife and the  
marital community comprised thereof,

Petitioners,

vs.

EASTGATE THEATRE, INC. D/B/A REGAL ENTERTAINMENT  
GROUP, a Washington Corporation; SIERRA CONSTRUCTION  
COMPANY, INC., a Washington Corporation; WAL-MART STORES,  
INC., (NUMBER 2385), a Washington Corporation,

Respondents.

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BRIEF OF RESPONDENT SIERRA CONSTRUCTION COMPANY

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## **I. INTRODUCTION**

This is a premises liability personal injury case. On April 3, 2009, after using an ATM at Regal Cinemas, located at 1101 Supermall Way in Auburn, WA, Appellant David Christman (“Christman”) slipped and fell while walking down a grassy area in front of the movie theater. Christman’s complaint alleges that Respondents were negligent, and that such negligence was a proximate cause of his fall and injuries.

Respondent Sierra Construction Company, Inc. (“Sierra”) Sierra, along with Respondents Wal-Mart Stores, Inc. (“Wal-Mart”) and Eastgate Theatre, Inc., d/b/a Regal Entertainment Group (“Regal Cinemas”) moved for summary judgment on the basis that there was no evidence to support Christman’s allegations of negligence, there was no evidence of breach, and that the condition in question, the grassy slope, was not unreasonably dangerous as a matter of law.

The trial court granted Sierra’s summary judgment motion, as well as the motions of Wal-Mart and Regal Cinemas. Christman filed a motion for reconsideration, which was denied.

This appeal followed.

## **II. COUNTER ASSIGNMENT OF ERRORS**

The trial court correctly granted Sierra’s motion for summary judgment when it determined that there were no genuine issues of material fact, and that Sierra was entitled to judgment as a matter of law. The trial court did not commit reversible error, and did not abuse its discretion.

The trial court correctly denied Christman's Motion for Reconsideration.

### III. STATEMENT OF CASE

**A. Basic Facts:** On April 3, 2009, Christman arranged to meet a seller from Craigslist to look at, and possible buy, a bicycle for his son. Christman and the Craigslist seller agreed to meet in the parking lot in front of Regal Cinemas. (CP 44, 45 & 48) While waiting for the seller to arrive, Christman used an ATM to get some cash. The ATM is located on the exterior of Regal Cinemas, near the entrance. (CP 45) When walking *to* the ATM, Christman does not recall whether he used the stairs or whether he walked across the grass. (CP 138) When he walked *from* the cash machine back to the parking lot, he walked across the grass, because the route was more direct. (CP 49) As he was walking across the grass, one of his feet slipped out from under him, and he fell toward the bottom of the incline near the sidewalk adjacent to the road. (CP 138). There was nothing preventing Christman from using the stairs to get back to the parking lot. (CP 50, 139) Christman said the grassy area "looked like any other hill, and did not appear unreasonably steep to him. (CP 139) The grass was wet, but given the time of year, early April, this did not surprise him. (CP 142)

**B. Parties:** Regal Cinemas operates the movie theater. Wal-Mart has a store located at the mall and contracted with Sierra to perform certain site improvements to the road directly in front of the movie theater.

**C. Sierra's Scope of Work:** Sierra's construction work, and improvements, included, among other things, the relocation of Supermall Drive in front of Regal Cinemas, as well as the creation of a drop off lane and adjacent sidewalk in front of Regal Cinemas. No changes were made to the staircase in front of and leading up to Regal Cinemas. (CP 64 – 69) Sierra performed construction work only. Sierra did not provide architectural, design or engineering services as part of its contract with Wal-Mart. The construction work was permitted, and inspected by the City of Auburn Public Work's Department. The construction work was performed in compliance with the plans and specifications for the project, and was completed before April 2, 2009. (CP 64 – 69)

#### **IV. SUMMARY OF ARGUMENT**

**1. Summary Judgment Standard:** This court's review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. If the pleadings, depositions, admissions on file and the affidavits submitted demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, then summary judgment is proper.

**2. No Evidence of Negligence and No Duty:** In response to Sierra's summary judgment motion, Christman produced no evidence that Sierra was negligent. Because Sierra is not a possessor of the property, it does not owe Christman and duty of care.

**3. Condition is Not Unreasonably Dangerous:** The photographs of the grassy area where Christman fell – the area between the sidewalk and the area just outside of the theater – was not unreasonably dangerous as a matter of law. The grassy area was never intended to be used as a walkway.

**4. Declaration of Expert Dan Johnson:** The Declaration of Christman’s expert does not raise a genuine issue of material fact such that the Court of Appeals should reverse the trial court’s dismissal of the case.

## V. ARGUMENT

### 1. Summary Judgment Standard:

This court’s review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-435, 13 P.3d 633 (2000). In a summary judgment proceeding, the reviewing court makes the same inquiry as the trial court. *Hontz v. State*, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986). If the pleadings, depositions, admissions on file and the affidavits submitted demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, then summary judgment is proper. CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). A moving defendant may satisfy its burden by showing that there is an absence of evidence to support the non-moving party’s case. The moving party is entitled to summary judgment when the non- moving party fails to make a sufficient

showing on an essential element of its case in which it has the burden of proof. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

**2. No Evidence of Negligence and No Duty:**

Christman presented no evidence to support the allegation of negligence against Sierra. In order to establish a cause of action for negligence against Sierra, Christman must prove four (4) essential elements, duty, breach, causation and damages. *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). To establish proximate cause in a negligence action, Christman must show that Sierra's actions were both the cause in fact, "but for" causation, and legal cause of its injuries. *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 357, 961, P.2d 952 (1998). The casual connection between defendant's actions and the alleged injury must not be left to surmise, speculation, or conjecture. *Wilson v. Northern Pacific R. Co.*, 44 Wn2d, 122, 127-128, 265 P.2d 815 (1954); *Almquist v. Finely School District*, 114 Wn. App. 395, 57 P.3d 1191 (2002).

Wal-Mart retained Sierra to perform construction work in front of the theater. The construction improvements included, among other things, the relocation of Supermall Drive in front of Regal Cinemas, as well as the creation of a drop off lane and adjacent sidewalk in front of the theater. No changes were made to the staircase in front of and leading to the theater. Sierra performed construction work only. Sierra did **not** provide architectural, design or engineering services as part of its contract with Wal-Mart. BCRA, Inc. a company located in

Tacoma, WA, was the architectural and engineering firm that provided all the plans and specifications for the project. BCRA, Inc. was retained directly by Wal-Mart. The construction work was permitted, and inspected by the City of Auburn Public Work's Department. The construction work was performed in compliance with the plans and specifications for the project, and was completed before April 2, 2009. (CP 64 – 69, 286 – 296)

There is no evidence that Sierra's construction work did not comply with the plans and specifications, or that it did not meet industry standards in any respect. Christman presented no evidence that Sierra was negligent, and/or that such negligence a proximate cause of the fall. As such, the trial court's dismissal should be affirmed.

Christman tried to create genuine issue of material fact by arguing that somehow Sierra's work was non-compliant. Christman's assertions are simply conclusory statements and not evidence. All of Christman's conclusory assertions were addressed by Sierra's Project Manager, Jim Riley, in his Supplemental Declaration. (CP 286 – 296) For example, Christman's asserts that a 97' handrail should have been installed, but wasn't. The handrail was a change order, and was requested by Wal-Mart several months after Christman's fall. Other than conclusional assertions, such as "the drainage was inadequate," Christman offered no evidence that any of Sierra's work failed to comply with the plans and specifications.

Christman's claim also fails because Sierra does not owe him a duty of care. The existence of a duty in an action for negligence is a question of law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984); *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d, 128, 875 P.2d 621 (1994); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48-49, 914 P.2d 728 (1996). Here, Sierra is not a "possessor" under the Restatement (Second) of Torts. It was not the owner of the premises where the incident took place. Nor was Sierra in control of the premises at the time. Sierra's construction work was completed (and inspected and approved by the City of Auburn), before Christman's incident.

**3. Grassy Area is Not Unreasonably Dangerous:** The photographs of the grassy area speak for themselves. (CP 67 – 69). This case is analogous to *Hoffstater v. City of Seattle*, 105 Wn.App. 596, 20 P. 3d (2001). As Christman here, the plaintiff in *Hoffstater* argued that the defendants in control of a landscaped area between parking spaces were negligent. The Court of Appeals concluded that the landscaped strip was not unreasonably dangerous and that the "possessors" were not negligent as a matter of law. "A reasonably safe condition is not the same for a parking strip as it is for a sidewalk because their purposes are different. In contrast to a sidewalk, which is devoted almost exclusively to pedestrian use...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 expect to be maintained in the same condition.” *Hoffstater*, 105 Wn.App at 600.

Access to the theater entrance, as well as to the ATM, was by way of the staircase directly in front of Regal Cinemas. The grass and landscaping adjacent to the stairs is obviously ornamental and was not intended to be used by pedestrians.

The trial court correctly determined that because the grassy area located next to the staircase was installed for ornamental or beautification purposes, it not unreasonably dangerous as a matter of law. The Court of Appeals should affirm the trial court’s decision.

**4. Motion to Strike/Disregard Johnson Declaration:**

The trial court did not abuse its discretion by disregarding the Declaration of Daniel Johnson. In its Rebuttal Brief, Sierra objected to and moved to strike the Declaration of Daniel Johnson, which contains nothing but conclusional statements. Conclusions of law stated in an affidavit filed in a summary judgment proceeding are improper and should be disregarded. *Hash v. Children’s Orthopedic Hosp. & Medical Ctr.*, 49, Wn. App. 130, 741, P.2d 584 (1987), *aff’d* 110 Wn.2d 912, 757 P.2d 507 (1988); *Orion Corp v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985, cert denied, 486 S. Ct 1996, 100 L.Ed. 2d 227 (1988)); Conclusory statements and legal opinions cannot be considered in a Declaration in response to a summary judgment motion, and the trial court will not abuse its discretion by excluding an affidavit because it contains conclusory assertions rather than factual allegations. *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999). *Marks*

*v. Benson*, 62 Wn. App. 178, 813 P.2d 180, review denied, 118 Wn.2d 1001, 822 P.2d 287 (1991). A court may not consider inadmissible evidence when ruling on a summary judgment motion. *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn. 2d 819, 826, 872 P.2d (1994).

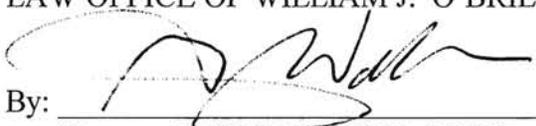
Even beyond the conclusional statements, Johnson's Declaration does not create a genuine issue of material fact such that the trial court's dismissal of Christman's case should be reversed. Johnson has a PhD in Psychology, and is not qualified to say whether or not Sierra's construction work met industry standards and/or whether its construction work was in compliance with the plans and specifications provided by BCRA. Johnson is not a soils engineer, or any type of engineer, and has no qualifications whatsoever to make conclusional assertions about whether the slope or drainage at issue meets design standards or not.

## VI. CONCLUSION

For the foregoing reasons, the trial court's dismissal of Christman's claims against Sierra should be upheld.

Respectfully submitted this 18<sup>th</sup> day of November.

LAW OFFICE OF WILLIAM J. O'BRIEN

By: 

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DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that I caused to be served in the manner indicated a true and accurate copy of *BRIEF OF RESPONDENT SIERRA CONSTRUCTION COMPANY* upon the following:

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